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JIBC IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

QUANTUM OF EVIDENCE & DEGREE OF CERTAINTY

Most of the cases in this issue deal in some way with the concept of reasonable grounds. Please read them carefully to see what they are telling you. Our justice system labours on the premise that the party who accuses or alleges must offer proof.

In a criminal trial, the burden of proof falls on the Crown to prove the case against an accused beyond a reasonable doubt. This criminal standard need not reach absolute certainty and applies to the final determination of guilt or innocence, not to individual pieces of evidence. In some cases this standard is also used in other contexts, such as determining the voluntariness of confessions. Prosecution services have also recognized this high watermark by implementing policy to guide their lawyers on deciding whether charges should be laid or whether to continue with a prosecution. Depending on the prosecution service involved, these policy based standards can range from the highest, a substantial likelihood of conviction in British Columbia, to a reasonable prospect of conviction (Ontario), a reasonable likelihood of conviction (Alberta), or a realistic prospect of conviction (Nova Scotia).

In civil cases, the burden falls on the plaintiff to prove the case against a defendant on a balance of probabilities. This civil standard, also known as a preponderance of the evidence or a more likely than not threshold, also has other applications in law aside from attributing liability, such as deciding preliminary questions pertaining to the admissibility of evidence.

Like both the criminal and civil standards at the trial stage, there are other legal standards recognized at law during the early stages of an investigation, i.e. reasonable grounds. And in the law enforcement world this 'reasonable grounds' term informs both a belief threshold (eg. the standard justifying an arrest, search warrant, or breathalyzer demand) and a suspicion threshold (eg. the standard justifying an investigative detention, a canine sniff, or an ASD demand).

In determining whether reasonable grounds exists, courts have clearly enunciated an analysis having a two-prong test. There are both subjective and objective elements. Under the first prong of the analysis, the officer must subjectively—and genuinely—believe he or she has reasonable grounds. In the mind of the officer, he or she must be satisfied that reasonable grounds exists. This subjective belief relates to what is in the mind of the officer when a power (such as search, detention, or arrest) is exercised. If the judge is not satisfied that the officer had the necessary subjective element, the police power exercised is, for that reason, unlawful; whether or not the objective test is satisfied is irrelevant to the legality of the arrest, for example. What the officer could have done doesn't count (except maybe perhaps in a s.24(2) analysis).

Under the second prong of the analysis, the grounds must be objectively established. The objective test is whether a reasonable person, standing in the shoes of the officer, would have believed that reasonable grounds existed. This objective standard recognizes that the exercise of police powers must be subjected to the detached, independent, and neutral scrutiny of a court that must evaluate the reasonableness of the police action in light of the particular circumstances that were apparent to the officer. This serves to avoid and provide a safeguard **Continued next page.**

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:
In service: 10-8. -- Vol. 1, no. 1 (June 2001)
Monthly
Title from caption.
"A newsletter devoted to operational police officers across British Columbia."
ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police - Legal status, laws, etc. - Canada - Cases - Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten-eight.

Unless otherwise noted all articles are authored by Mike Novakowski, MA. The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments or contributions to this newsletter. If you would like to be added to our electronic distribution list e-mail Mike Novakowski at mnovakowski@jibc.ca.

POLICE LEADERSHIP APRIL 10-13, 2011

Mark your calendars. The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia Police Academy are hosting the Police Leadership 2011 Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference and will provide an opportunity for delegates to discuss leadership topics presented by world renowned speakers.

www.policeleadershipconference.com

Continued from cover. against arbitrary and indiscriminate police action and to prevent the officer from being the ultimate judge of their own decision. This objective standard also imposes a responsibility on the police to act with restraint and after careful assessment; ensuring police discretion is sufficiently constrained. Intuition, for example, is insufficient since there is no objective, or factual basis upon which a court can assess the intuition. Similarly, a mere suspicion or assumption will not qualify as objectively reasonable, nor do police feelings, hunches or Spidey senses. **Enjoy the read.**

HELICOPTER OBSERVATION OF GREENHOUSES USING ZOOM CAMERA NOT A 'SEARCH'

R. v. Kwiatkowski, 2010 BCCA 124

While conducting a routine search from a police helicopter for outdoor marihuana grow operations at an altitude in excess of 1,000 feet (the minimum altitude for aircraft flying over "built-up" areas), police spotted a property with greenhouses situated in a suspiciously remote location. The property was a large rural acreage with a residence and several other outbuildings situated near the front of the property. The greenhouses were situated at the rear of the property in a clearing that was sheltered and partially obscured by a stand of trees. The helicopter flew around the property, but not over it, at a radius of one-half mile. Using a zoom lens available from a retail outlet, police could see plants with a distinctive green colour through the translucent walls of the greenhouses and observed, from one angle, a plant thought to be marihuana through an open door of one of the greenhouses. The next day, and again five days later, police flew around the property to take more pictures. A telewarrant was successfully obtained to search the house, outbuildings and property using the aerial surveillance, information from police databases, and other information.

> "[The aerial] surveillance did not intrude on the [accused's] reasonable expectation of privacy and it is not necessary to consider whether it was violated by police conduct. Furthermore, since s. 8 is not engaged, the police were not obliged to obtain a warrant to conduct an aerial "search". Therefore, the search did not infringe his s. 8 Charter rights."

While executing the warrant, officers approached the clearing where the greenhouses were located and saw marihuana plants inside the greenhouses. They also saw the accused inside one of the greenhouses with a garden hose in his hand. Police entered the greenhouse with their guns drawn, identified themselves and said they had a search warrant. The accused was ordered to the ground, handcuffed, and arrested for marihuana production. Another man was also arrested at gunpoint. The residence was cleared and the property was searched; police seized about 3,000 marihuana plants from five greenhouses, which were capable of producing 381 pounds of marihuana. The wholesale value was $573,000, with a potential for three crops per year. During the search and inventory of the greenhouses, police cut open the plastic side walls of the greenhouses for ventilation. The search of the garage resulted in the seizure of equipment suitable for use in an indoor grow operation and 89 marihuana clone plants. The residence was searched and identification in the accused's name was seized together with 772 grams of dried marihuana, scales, plastic baggies and a heat-sealing machine.

At trial in British Columbia Provincial Court the judge ruled that the aerial observation and photographs taken using a zoom lens was not "any different than the use of binoculars or, to return to the highway patrol analogy, police use of radar on a public highway. At no time was the notional airspace of the subject property intruded upon by the police," said the judge. "There is no privacy interest that the defendants can claim in relation to a neighbour's airspace." Since the accused had no standing to advance a s.8 *Charter* claim there was no search.

The judge also ruled that the manner of the execution of the search warrant was not unreasonable. "There is no authority for the requirement that an announcement be made as soon as police set foot on a property," he said. "Police executing a search warrant can set up members at various exits to a residence prior to knocking and demanding entry. Rationale behind the 'knock and announce' rule is to announce to the householder the arrival of police and give him or her an opportunity to open the door voluntarily. It is

difficult to envision what sort of knock police would be required to make when entering a rural acreage. Perhaps defence is suggesting a form of 'hallooing' to alert those on the property that the police are on the way. Not only has this procedure not been mandated by any court, but there are the disadvantages of giving accused persons an opportunity to flee, to dispose of evidence, or to set up an ambush." As for the damage to the greenhouses, the cutting of the plastic walls was incidental to the search and seizure and was not gratuitous or spiteful. The accused was convicted of unlawfully producing and possessing marihuana for the purpose of trafficking.

The accused then challenged the lower court ruling appealed to the British Columbia Court of Appeal arguing, among other grounds, that the police were required to obtain a general warrant under s.487.01 of the *Criminal Code* before conducting the aerial surveillance of the property using a telephoto zoom lens. As well, the manner of the execution of the search warrant (no-knock, weapons drawn, and unnecessary damage in cutting the walls) was also challenged.

The Aerial "Search"

The Court of Appeal rejected the accused's submission that he had an expectation of privacy over the property he was occupying and that the technology used by the police permitting them to observe and photograph his fields and greenhouses from a height of 1,000 feet amounted, to a s.8 of the *Charter* violation. Using the totality of the circumstances approach, Justice Kirkpatrick, delivering the opinion of the court, found the accused did not have a reasonable expectation of privacy.

Subject matter of the aerial surveillance: the subject matter of the aerial surveillance was the greenhouses and not the dwelling house located on the property. The greenhouses were constructed with opaque or translucent plastic walls which permitted limited viewing of their interior. The photographs were taken from adjacent airspace at an altitude of at least 1,000 feet, the minimum height for aircraft flying over built-up areas, although the property was located in a rural area that would have allowed for fly-overs at 500 feet. The photographs and visual surveillance permitted the police to observe the lay-out of the property and buildings and to observe the distinctive green colour of the plants seen in the greenhouses.

The accused's direct interest in the subject matter of the surveillance: the Crown conceded that the accused had a direct interest in the subject matter of the surveillance since he occupied the private property on which the greenhouses were located.

The accused's subjective expectation of privacy: the accused did not testify and there was no evidence from him that he had a subjective expectation of privacy in the greenhouses. Although "information about what happens inside the home is regarded by the occupants as private," this was not a person's home, which has long been held to be a place protected from state intrusion. Instead they were translucent non-residential structures located a long distance from the residence with no actual road leading to it.

Was there an objectively reasonable expectation of privacy?

i. ***The place where the alleged search occurred.*** the police did not enter onto the private property of the accused or even over it. The focus of the surveillance was not the accused's home and revealed nothing in respect of the home other than its location on the property.

ii. **Was the subject matter in public view?** The greenhouses were visible from the air and anyone in an airplane, helicopter, or other aerial device would have been able to see what the police observed and photographed. Anyone using binoculars would have seen what the police saw and the zoom lens employed by the police was readily available at retail stores. It was not advanced or unique technology and did not permit the police to determine what activities were taking place inside the greenhouses that were not otherwise observable given the translucent walls of the structures. Additionally, the police

were able to see a marihuana plant through a greenhouse door that was left open. Thus, the plant was in public view.

iii. ***Was the information already in the possession of third parties?*** The information was not already in the hands of third parties, although it could have easily been if anyone flew over the property with binoculars or a camera.

iv. ***Was the police technique intrusive in relation to the privacy interest?*** Aerial surveillance of the greenhouses from a neighbouring airspace could not be considered intrusive.

v. ***Was the use of surveillance technology itself objectively unreasonable?*** The surveillance technology used (a camera with zoom capability) was not extraordinarily powerful, technologically advanced, or any more sophisticated than binoculars. It was not capable of seeing "through" walls except to the extent that greenhouses must admit light and therefore have increased visibility. There was nothing objectively unreasonable in the police use of this technology.

vi. ***Did the surveillance technology expose any intimate details of the accused's lifestyle or part of his core biographical data?*** It was the construction material used for the greenhouses that permitted the police surveillance to see the activity occurring in the greenhouses. It was not the technology that was particularly advanced or intrusive. It did not reveal the kind of private activities that the courts are concerned with protecting from observation in dwelling houses or other private structures.

Justice Kirkpatrick noted:

> The aerial surveillance in this case cannot realistically be likened to a warrantless perimeter search or a trespass. In my opinion, the surveillance did not intrude on the [accused's] reasonable expectation of privacy and it is not necessary to consider whether it was violated by police conduct. Furthermore, since s. 8 is not engaged, the police were not obliged to obtain a warrant to conduct an aerial "search". Therefore, the search did not infringe his s. 8 Charter rights. [para. 41]

"No-Knock"

The accused unsuccessfully contended that the search was unreasonable because the police failed to comply with the "knock-notice" rule. In citing previous case law, the Court of Appeal stated the "knock-notice" rule as follows:

> Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance.

This rule, the Court of Appeal noted, derives from the principle "that a person's home is protected from the forces of the Crown." The emphasis has always been on the sanctity of the home or dwelling house and the police duty to announce their presence and purpose before forcing entry into a dwelling house. But here, the privacy interests protected by the knock-notice rule did not extend to the entry of the greenhouses. Although the Court did not rule out a defence suggestion that it might be a feasible alternative in another case for the police to first present themselves and the warrant at the dwelling house on the property, secure it, and then move to secure and search the remaining buildings on the property, the failure of

"Except in exigent circumstances, the police officers must make an announcement prior to entry. ... It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance."

the police to knock and announce their presence before entering the greenhouse did not render the search unreasonable:

> [I]n this case the object of the police search were greenhouses on a large rural property a long distance from the dwelling house. A related object was of course the arrest of persons tending the grow operation. The police did not force entry into the greenhouse. [The officer] walked through the open door and announced his presence. To require the police to first alert persons working in or around the greenhouses was ... impractical and an invitation to those present to flee, destroy evidence, or set up an ambush. [para. 58]

Drawing Firearms

The accused's contention that the police acted unreasonably in drawing their firearms in the absence of any specific concerns for officer safety and no evidence that anyone associated with the property had a history of violence or was likely to be armed was also rejected. "The police were executing a warrant at a large marihuana grow operation in a rural area with an unknown number of persons tending or protecting the operation," said Justice Kirkpatrick. "To ignore the modern realities of the dangers associated with sophisticated illicit operations such as this one would, in my opinion, be extremely naive. The police arrest of the [accused] and his co-accused using drawn weapons was not, in these circumstances, unreasonable."

Damaging the Greenhouses

The actions of the police in cutting the plastic walls to ventilate the greenhouses was neither gratuitous nor spiteful. "The execution of search warrants, particularly of marihuana grow operations, will inevitably result in some damage," said the Court. The actions of the police did not render the execution of the search warrant unreasonable.

Since there were no *Charter* breaches it was unnecessary to consider s. 24(2) of the *Charter*. The accused's appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of it's most recent acquisitions which may be of interest to police.

Community response to marijuana grow operations: a guide towards promising practices.
Len Garis ... [et al.].
[Surrey, B.C.]: City of Surrey; [Abbotsford, B.C.]: University of the Fraser Valley, 2009.
HV 5822 M3 C667 2009.

Crime and justice : a review of research. Volume 38.
edited by Michael Tonry.
Chicago, Ill. : University of Chicago Press ; Bristol : University Presses Marketing [distributor], 2009.
HV 6001 C672 2009

Ethics for criminal justice professionals.
Cliff Roberson, Scott Mire.
Boca Raton, FL : CRC Press/Taylor & Francis, c2010.
HV 9950 R627 2010

Handbook of psychology of investigative interviewing : current developments and future directions.
edited by Ray Bull, Tim Valentine and Tom Williamson.
Chichester, UK; Malden, MA: Wiley-Blackwell, 2009.
HV 8073 H258 2009

Responding to marijuana grow operations: a community handbook.
[Surrey, B.C.] : City of Surrey, 2009.
HV 5822 M3 R476 2009

Social work with young people.
Roger Smith.
Cambridge, UK : Polity, 2008.
HV 713 S594 2008

I-4 pile-up. [videorecording].
Carrollton, Tex. : Critical Information Network, c2009.
1 videodisc (DVD) (30 min.): sd., col.; 4 3/4 in. + 1 guide (9 p.). Title from container. "463-1009"--disc surface. Motor vehicle crashes in low-visibility conditions create a host of concerns for responders. Addresses planning prior to a disaster, safety concerns for responders working in near zero-visibility conditions, logistical needs of responders, and the value of multiagency exercises in preparing for large-scale emergencies.
TH 9310.5 A443 2009 OCT D907

Risk analysis and security countermeasure selection.
Thomas L. Norman.
Boca Raton : CRC Press, c2010.
HV 8290 N67 2010

Risk assessment decisions for violent political extremism.
D. Elaine Pressman.
[Ottawa, Ont.]: Public Safety Canada/ Securité publique Canada, 2009.
JC 328.6 P747 2009

Social work with young people.
Roger Smith.
Cambridge, UK : Polity, 2008.
HV 713 S594 2008

Understanding criminal careers.
Keith Soothill, Claire Fitzpatrick and Brian Francis.
Cullompton : Willan, 2009.
HV 6080 S725 2009

Understanding youth offending: risk factor research, policy and practice.
Stephen Case and Kevin Haines.
Cullompton : Willan, 2009.
HV 9145 A5 C367 2009

Working with the enemy: how to survive and thrive with really difficult people.
Mike Leibling.
London ; Philadelphia : Kogan Page Limited, 2009.
BF 637 I48 L57 2009

Evaluating crime reduction initiatives.
edited by Johannes Knutsson and Nick Tilley.
Monsey, NY: Criminal Justice Press, 2009.
HV 7431 E93 2009

Violence against women in South Asian communities: issues for policy and practice.
edited by Ravi K. Thiara and Aisha K. Gill ; foreword by Liz Kelly.
London ; Philadelphia : Jessica Kingsley Publishers, 2010.
HV 6250.4 W65 V567 2010

Verbal judo [videorecording]: **two hour civilian overview**
George J. Thompson.
Auburn, NY : Verbal Judo Institute, [1989].
1 videodisc (120 min.) : sd., col. ; 4 3/4 in. + tactical review card.
George Thompson teaches powerful communication skills that allow you to respond professionally to others, no matter what tensions may be present, and covers how to represent yourself and your ideas with greater persuasiveness and eloquence. This program is adapted for a civilian audience.
HM 132 T46 1989 D932

Color atlas of forensic medicine and pathology.
[electronic resource]
edited by Charles A. Catanese.
Boca Raton : CRC Press, c2010.
This electronic version of the text features cases from the New York City medical examiner's office, one of the busiest in the U.S. Because of the number of autopsies performed at this office, the range of examples is exhaustive. The topics covered include typical gunshot wounds, blunt and sharp force trauma, natural diseases with forensic ramifications, accidental deaths occurring in a therapeutic setting, and non-fatal pathologies. This disc provides over 1200 color photographs that address both civil and criminally oriented cases.
RA 1063.4 C65 2010

Comparative policing: the struggle for democratization.
M. R. Haberfeld, Ibrahim Cerrah, editors.
Los Angeles: SAGE Publications, c2008.
HV 7921 C644 2008

Criminalistics: an introduction to forensic science.
Richard Saferstein.
Upper Saddle River, N.J.: Pearson Prentice Hall, 2010.
HV 8073 S24 2010

Federal police law, 2010: annotated Royal Canadian Mounted Police Act and Regulations, 1988 and other regulatory instruments.
Alain-Robert Nadeau.
Cowansville, Québec: Éditions Y. Blais, 2009.
KE 5008 N34 2010 (Shelved in Reference Section)

Gang investigator's handbook: a law-enforcement guide to identifying and combating violent street gangs.
[Matthew David O'Deane].
Boulder, Colo.: Paladin Press, c2008.
HV 8080 G35 O34 2008

Intelligent video surveillance: systems and technology.
edited by Yunqian Ma and Gang Qian.
Boca Raton: CRC Press, c2010.
HV 7936 T4 I58 2010

Introduction to private security: theory meets practice.
Cliff Roberson, Michael L. Birzer.
Upper Saddle River, N.J.: Prentice Hall, c2010.
HV 8291 U6 R63 2010

The role of local police: striking a balance between immigration enforcement and civil liberties.
by Anita Khashu.
Washington, DC: Police Foundation, 2009.
HV 7936 C83 K44 2009

School violence: studies in alienation, revenge, and redemption.
Ingrid Rose.
London: Karnac Books, 2009.
LB 3013.3 R66 2009

Security manager's guide to disasters: managing through emergencies, violence, and other workplace threats.
Anthony D. Manley.
Boca Raton, FL: CRC Press, c2009.
HD 49 M362 2009

Substance abuse in Canada.
Marilyn Herie, Wayne Skinner.
Don Mills, Ont. : OUP Canada, 2009.
HV 5000 C3 H47 2009

Tactical perfection for street cops: survival tactics for field contacts, dangerous calls, and special arrests.
by Steve Albrecht.
Boulder, Colo.: Paladin Press, 2009.
HV 8080 P2 A385 2009

Understanding criminal investigation.
Stephen Tong, Robin P. Bryant, Miranda A.H. Horvath.
Chichester, UK; Malden, MA: Wiley-Blackwell, 2009.
HV 8073 T66 2009

Urbanization, policing, and security: global perspectives.
edited by Gary Cordner, AnnMarie Cordner, Dilip K. Das.
Boca Raton: CRC Press: International Police Executive Symposium, c2010.
HV 7243 U727 2010

Verbal judo [videorecording]: **dramatizations.**
Auburn, NY: Verbal Judo Institute, Inc., 2007.
1 videodisc (42 min.): sd., col.; 4 3/4 in. (DVD).
The sessions on this disc are divided into segments appropriate for use in Roll-Call sessions. Using dramatizations, Dr. George Thompson teaches law enforcement professionals how to use presence and words to deal effectively with, and generate voluntary compliance from "difficult people." The sessions produced with the Milwaukee Police Dept. include the following incidents: a tavern, a graveyard, child support, speeding, tourists and a beer drinker.
HM 132 V473 2007 D933

Dissolve [videorecording]: **a documentary on drug facilitated sexual assault.**
Vancouver, B.C. : Moving Images Distribution, c2009.
1 videodisc (42 min.) : sd., col. ; 4 3/4 in.
Title from container.
A little liquid or powder is slipped into a drink. Women are being drugged into unconscious or semi-conscious states and being raped. They often have little or no memory of the attack or attacker -- just the feeling that something horrible has happened. Due to the lack of awareness about these drugs, women are unaware of how vulnerable they are, and perpetrators are getting away with their crimes. Women need to know what they can do to protect themselves, heal, and potentially send their attackers to prison. Dissolve is a documentary on drug-facilitated sexual assault that will inform, provoke and engage both men and women.
HV 6558 D57 2009 D905

Canadian evidence law in a nutshell.
by Ronald J. Delisle, Lisa Dufraimont
Toronto, Not: Carswell, 2009.
KE 8440 D445 2009

Challenges to fingerprints.
Lyn Haber, Ralph Norman Haber.
Tucson, AZ: Lawyers & Judges Pub., c2009.
HV 6074 H33 2009

Crime scene photography.
Edward M. Robinson; with a foreword by Gerald B. Richards.
Amsterdam; Boston: Academic Press/Elsevier, c2010.
TR 822 R63 2010

Critical issues in policing: contemporary readings.
[edited by] Roger G. Dunham, Geoffrey P. Alpert.
Long Grove, Ill.: Waveland Press, c2010.
HV 8138 C6973 2010

Forensic dentistry.
edited by David R. Senn, Paul G. Stimson.
Boca Raton: Taylor & Francis, 2010.
RA 1062 F67 2010

Identity theft handbook: detection, prevention, and security.
Martin T. Biegelman.
Hoboken, N.J.: Wiley, c2009.
HV 6679 B54 2009

Law enforcement exam preparation study guide.
[Joseph J Rios].
[S.l.]: Lulu, c2007.
HV 7923 R56 2007

Police corruption: deviance, accountability and reform in policing.
Maurice Punch.
Devon; Portland, Ore.: Willan Publishing, c2009.
HV 7936 C85 P66 2009

Police officer's guide to K9 searches.
Stephen A. Mackenzie.
Calgary: Detselig Enterprises, c2010.
HV 8025 M323 2010

The portable guide to evidence.
by Michael P. Doherty.
Toronto [Ont.]: Thomson Carswell, c2009.
KE 8440 D646 2009

Private security and the investigative process.
Charles P. Nemeth.
Boca Raton [Fla.]: CRC Press/Taylor & Francis, c2010.
HV 8091 N46 2010

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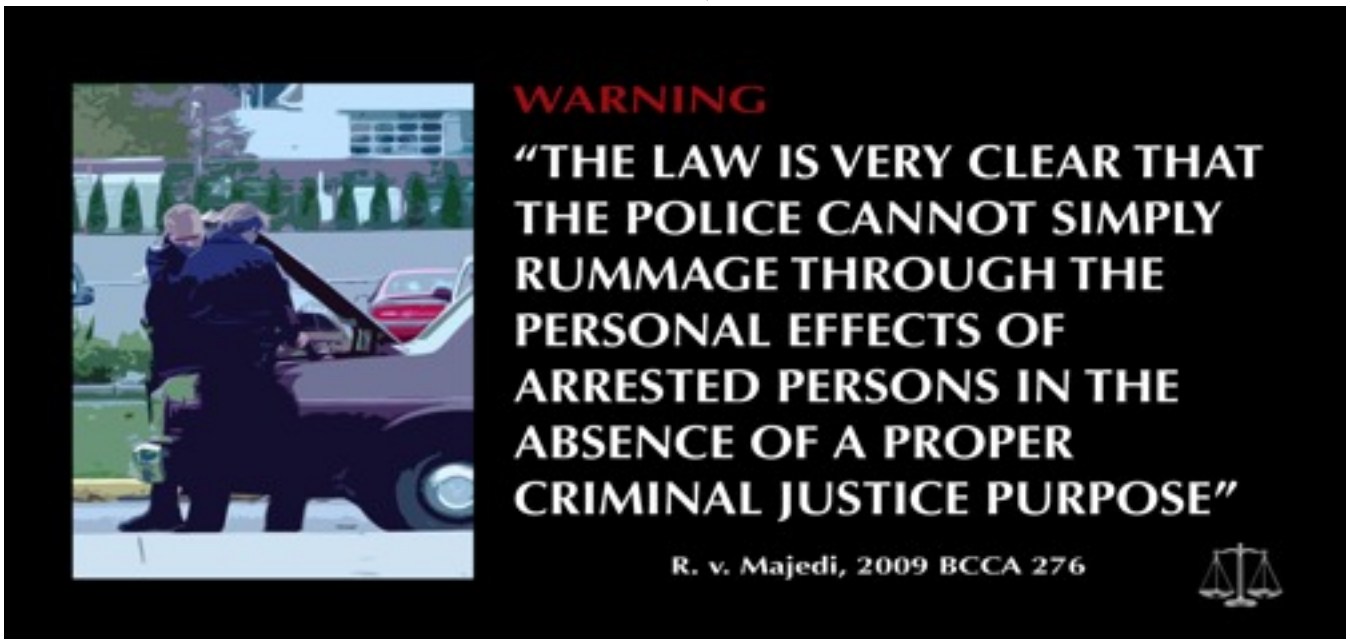


WARRANTLESS INVENTORY SEARCH OF VEHICLE REASONABLE

R. v. Strilec, 2010 BCCA 198

The accused was riding a dirt bike motorcycle on a busy rural highway when he was stopped by a police officer concerned about several vehicle infractions. It was near dusk but the dirt bike displayed no headlights or taillights and the officer did not see it driving until he came up beside it. Because the dirt bike was travelling on the highway, it was required to be insured and equipped with illuminated headlights and taillights one-half hour after sunset. The accused was asked for his driver's licence, but replied that he did not have one. He said it was not his bike, it belonged to another person, and it was not insured. The officer told the accused that having no insurance was an "arrestable offence" under the *Motor Vehicle Act* (*MVA*-s.79. But instead of arresting the accused, he was going to "detain" him for no insurance. The accused was patted down for weapons, handcuffed, and placed in the back of the police car (where the doors could not be opened from inside) until his name and driving status could be confirmed. The officer said he did this because he had to check the VIN number, wasn't sure whether the bike was stolen or not, and had drivers take off on him in the past. The pat down produced a small plastic bag, found in the accused's pants pocket, which contained pills the accused identified as "painkillers". Computer checks revealed the accused did not have a driver's licence, that the dirt bike was not insured, had not been registered, and had not been reported stolen. In addition, the officer learned the accused was a motor vehicle impound candidate under s.104.1 of the *MVA*, which meant the motor vehicle he drove could be impounded if he drove or operated a motor vehicle on a highway.

Before impounding the motorcycle, the officer decided to retrieve whatever personal items were on the bike before the tow truck arrived. There was a pouch attached to the handle bars. Because he could not see how to detach the pouch, the officer simply removed the contents of the pouch to take to his car. He had no suspicion that the pouch contained drugs and searched it "for inventory purposes," intending to return the contents of the pouch to the accused when he was released. Plus, he didn't want the accused to go back to the dirt bike because of the risk that he might leave. Upon opening the zippered pouch, the officer saw two cell phones and a plastic bag containing lottery tickets. He knew lottery tickets were commonly used to wrap drugs, so he opened one and found a white substance he believed to be cocaine. It was subsequently determined that there were 43 "lotto paper flaps" which had a gross weight of 35.5 grams including packaging. (One of the capsules from his pocket was also analyzed as morphine). The accused was then arrested for possessing cocaine for the purpose of trafficking. He said, "Trafficking? I was smoking." The accused was then advised of his right to counsel under s.10(b) of the *Charter* and said he wished to talk to a lawyer. From the time of the stop to when he was given his s.10(b) rights about 10 minutes had elapsed. He was taken back to the police station where he said he didn't need to speak to a lawyer because he was guilty. He was released on a promise to appear.

The trial judge found that placing the accused into the back of the police car while the officer made inquiries about the dirt bike was justified and the frisk search for safety reasons was not unreasonable; the road was narrow, busy with traffic, it was getting dark, and the accused's identity was unconfirmed. As well, the trial judge held that the accused failed to establish that he had a sufficient privacy interest in the pouch attached to the motorbike to argue that its search violated s.8 of the *Charter*; the accused claimed that he was not the owner of the dirt bike and had not called evidence of his relationship with the alleged owner. Even if the police breached s.8 the trial judge would have nonetheless admitted the evidence. Finally, because the accused was initially told why he was being detained and then given his s. 10(b) rights immediately after the the drugs were discovered and he was arrested, his *Charter* rights were provided as soon as practicable and the delay did not cause any prejudice to him. The accused was convicted of unlawfully possessing cocaine for the

"[T]he authority to impound provided by s. 104.1 of the Motor Vehicle Act carries with it the duty and responsibility to take care of the vehicle and its contents, and to do that the police must be able to conduct an inventory of the vehicle's contents."

purpose of trafficking and unlawfully possessing morphine.

The accused appealed his conviction for possessing cocaine for the purpose of trafficking to the British Columbia Court of Appeal arguing, in part, that his rights under ss.8 and 10(b) of the *Charter* were breached. In short, he suggested that his privacy was violated when the police officer examined the contents of the pouch. As well, he contended that he was denied his right to counsel.

Search - s.8

The accused argued that the police officer had no grounds to search the pouch, that its warrantless nature was unreasonable, and that the drugs found in the pouch should have been excluded under s. 24(2) of the *Charter*. However, the trial judge found that the accused had no reasonable expectation of privacy in the pouch and she did not feel it was necessary to determine whether the officer was entitled to empty the pouch for inventory purposes. The Court of Appeal, on the other hand, felt it was not necessary to discuss the privacy interest submissions because it concluded that the police had the authority to conduct an inventory search in these circumstances.

British Columbia's *MVA* contains provisions (s. 104.1-104.95) outlining an administrative procedure for impounding and returning vehicles seized from an unlicensed driver. This power authorized the impoundment of a vehicle for traffic safety reasons and allows the police to take possession of the vehicle and require that it be stored in a particular place. "[I]t is implicit in the legislation that the police have the duty and responsibility under the [MVA] to ensure the safety of the vehicle and its contents, and to do that they must be entitled to conduct an inventory of the vehicle's contents," said Justice Ryan delivering the opinion of the Court. "In my view the authority to impound provided by s. 104.1 of the [MVA] carries with it the duty and responsibility to take care of the vehicle and its contents, and to do that the police must be able to conduct an inventory of the vehicle's contents." Thus, the accused, even if having a privacy interest in the pouch, was not subject to an unreasonable search.

Right to Counsel - s.10(b)

Under s.73 of the *MVA* a police officer may require the driver of a motor vehicle to come to a stop and, when directed to do so, the driver is obliged to immediately come to a safe stop. Although no grounds are required to stop a vehicle under this provision, the stop must be related to traffic safety and regulation. Here, the accused was lawfully detained for the purpose of the *MVA* investigation; he was observed operating a dirt bike not equipped with headlights or taillights. The accused agreed that the police had the right to stop him and to briefly detain him without advising him of his s.10(b) rights while the police officer investigated other aspects of motor vehicle safety. He also did not challenge the decision of the police officer to take him to the police car and that it made sense to ask him to sit in it. However, the accused argued that the officer also handcuffed him and placed him in the back of the police car. These actions, in the accused's view, went beyond a brief roadside detention and became a *de facto* arrest, which required that he be informed of his right to contact counsel under s.10(b).

The Crown acknowledged that the duty to advise a person of their right to counsel arises on arrest or detention. However, it submitted that the officer was investigating matters involving highway safety and therefore was exempted, as a reasonable limit under s.1 of the *Charter*, from the requirement that s.10(b) rights be provided. In its view, the purpose of the stop and not the nature of the detention made it exempt from s.10(b).

The Court of Appeal agreed with the accused. Although the officer did not intend to arrest the

accused, his actions when viewed reasonably in the circumstances, met all the requirements of an arrest; he sat handcuffed in the police car. Here, It was unnecessary to characterize the accused's detention as a *de facto* arrest because the right to counsel also arises on detention and the purpose of the stop did not exempt the officer under s.1 of the *Charter* from advising the accused of his s.10(b) rights. After reviewing other appellate cases, Justice Ryan stated:

> What can be gathered from these cases is that it is not simply the purpose of the safety traffic stop that justifies a failure to provide the driver with his or her right to counsel. It is justified by the fact that the stop is brief, minimally intrusive and limited to what is reasonably necessary to achieve the purpose of the stop.
>
> It follows that when [the accused] was restrained by handcuffs and placed in the back of the locked police car he was not subject to the type of minimally intrusive detention that would have permitted [the officer]l to deal with him without providing him with his right to counsel. To the contrary, the detention was significant, coercive and incompatible with the type of stop anticipated by the decisions in Ladouceur and Orbanski. [The accused] was in a vulnerable position having been taken into the effective control of [the officer].
>
> .....
>
> Section 10(b) of the Charter was designed to protect persons in [the accused's] position.
>
> In conclusion I am of the view that the [accused] is correct in asserting that the type of detention he experienced in the case at bar triggered his rights guaranteed by s.10(b) of the Charter. [paras. 40-44]

The nature of the accused's detention required the police to advise him of the right to counsel and in failing to do so breached s.10(b).

"[I]t is not simply the purpose of the safety traffic stop that justifies a failure to provide the driver with his or her right to counsel. It is justified by the fact that the stop is brief, minimally intrusive and limited to what is reasonably necessary to achieve the purpose of the stop."

s.24(2) Exclusion

Since the police breached his s.10(b) *Charter* rights, the Court of Appeal had to determine whether his statements made to police should be excluded. In deciding whether evidence should be excluded under s.24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);

(2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and

(3) society's interest in the adjudication of the case on its merits.

The court's role on a s.24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

Seriousness of the Charter-infringing Conduct

The Court of Appeal found the seriousness of the *Charter*-infringing state conduct fell toward the middle or higher end of the spectrum of seriousness:

- although not willful or reckless, it was not inadvertent or minor;
- it did not result from a good faith mistake; the police officer had a negligent understanding of his authority and duties;
- the detention exceeded what was necessary and reasonable;

- although the officer feared the accused would leave the scene, he gave no reason for the concern except that he had such an experience with others;

- for the purpose of roadside detention the handcuffing was excessive and without authority;

- the Supreme Court judgment *R. v. Orbanski* was decided in 2005 and ought to have been known to him;

- the officer determined he could have arrested the accused under s.79 *MVA* which would have required s.10(b), but chose to detain him under s. 73 *MVA* which would not.

Impact on Charter-protected Interests

The impact of the breach on the *Charter*-protected interests of the accused was not minor nor fleeting. "[The accused] was only advised that he was being arrested for possession of cocaine after he had been patted down, handcuffed, and placed in the back of the police car," said Justice Ryan. "He was in a vulnerable position and made statements about the drugs before he was advised of his s.10(b) rights. The breach was a serious incursion on [the accused's] Charter interests."

Society's Interest in Adjudication on the Merits

The offence of possessing cocaine for the purpose of trafficking was serious and the public had an interest in truth-finding and in adjudicating serious crimes on their merits. However, there is a special concern that police conduct themselves properly in obtaining statements from suspects because of issues of reliability. Here, the accused's first statement was made immediately after being told that drugs had been discovered in the pouch on the dirt bike. His second statement was made after he had been advised of his rights and after he arrived at the police station. Thus, in these circumstances the concern about the reliability of both statements might appear to have been reduced. However, Justice Ryan found the first statement was elicited after the accused had been unlawfully placed in a vulnerable position while the officer carried on his inquiries. "It was while he was being held in this way that the [accused] was told that drugs had been found in the pouch on the dirt bike and that the statement was made," said Justice Ryan. "Thus the fact that he had been physically restrained for a period of time before making the statement detracts from its spontaneity and reliability." And as for the second statement it was tainted by the circumstances of the taking of the first; it was causally and contextually linked. "In other words, having made the first statement at the scene, and without being told that the first statement would have no impact on a second, there would be no point in [the accused's] mind that he talk to a lawyer, the damage was already done."

The statements were excluded and, without them, there was little evidence to connect the accused to the drugs found in the handlebar pouch. Absent such proof, the accused's appeal was allowed, his conviction was set aside, and an acquittal was entered.

Complete case available at www.courts.gov.bc.ca

BY THE BOOK:

s.79(b) BC's *Motor Vehicle Act*

An officer or constable of the Royal Canadian Mounted Police or of the police department of a municipality may arrest without warrant ... (b) a person driving a motor vehicle who the officer or constable has reasonable and probable grounds to believe is not insured as required by this Act or does not hold a valid and subsisting motor vehicle liability insurance card or financial responsibility card, ... and may detain the person arrested until he or she can be brought before a justice to be dealt with according to law.

ANONYMOUS TIP PLUS CORROBORATION AMOUNTS TO REASONABLE GROUNDS

R. v. Safi, 2010 ABCA 151

Police received an anonymous Crimestoppers tip that later in the day a 21-year-old individual named Safi would be arriving in Edmonton from British Columbia on a Greyhound bus carrying cocaine on his person as well as a handgun. Police checked out the name and found a date of birth, a residential address in British Columbia, involvement in a weapons complaint that year, and that Safi's recognizance did not allow him to be out of Alberta. They also obtained a photo. The Greyhound Bus company was contacted and police learned there was a bus soon arriving in Edmonton from Vancouver. But police were unable to confirm whether Safi was a passenger because Greyhound did not have a manifest. Members of the drug and tactical unit attended at the bus station to arrest or detain the accused for possession of drugs and weapons if he disembarked. He did arrive on the bus at the time suggested and when he disembarked he was immediately stopped by police, arrested, and searched. He was in possession of about 250 grams of cocaine, a handgun, and ammunition.

At trial in the Alberta Court of Queen's Bench on several charges including possessing cocaine for the purpose of trafficking, possessing proceeds of crime, and carrying a concealed handgun, the accused argued that his detention, arrest, and search breached the *Charter*. The trial judge, however, found that the police had sufficient information from the tip and their subsequent investigation to form reasonable grounds to arrest the accused and search him as an incident to that arrest. Not only did the officer have the necessary subjective grounds for arrest, it was also objectively reasonable; the tip was detailed, compelling and reliable based on its content and subsequent corroboration. As well, the trial judge held that the accused appeared to be breaching his recognizance which on its own would have provided grounds for arrest.

"The police did not act on the basis of an uncorroborated tip. Here they did further investigation."

The accused then appealed to the Alberta Court of Appeal submitting his rights under ss.8 and 9 had been breached and that the evidence should have been excluded under s.24(2). In his view, the tip was unreliable and insufficiently corroborated to justify an arrest; the arrest and search were therefore unlawful. He suggested that the details of the anonymous tip (which lacked detail and was indistinguishable from mere rumour or gossip), along with the police investigation that followed, was insufficient to satisfy the reasonable belief standard; both the details of the tip and the information subsequently obtained by police were innocuous and there was no information about the tipster, their reliability, or past performance. The Crown, on the other hand, contended that there were no *Charter* breaches because the police had reasonable grounds to either arrest or detain the accused based on the tip and subsequent police corroboration. Furthermore, the accused was breaching his recognizance which would have independently justified the arrest. Thus, searching the accused was either justified as incidental to arrest or as an incident to detention for officer safety reasons.

The Alberta Court of Appeal agreed with the Crown. Here, "the police did not act on the basis of an uncorroborated tip," said Justice Paperny. "They did further investigation." The trial judge did not make a mistake in finding reasonable grounds for the arrest. Although the tip was anonymous, it was specific enough that it outlined a date of arrival, a name, age, mode of transportation, and where the accused was coming from. There were also sufficient details of the alleged offence. As well, the tip was compelling because the police investigation matched the name and age of an individual, and there was a potential breach of a recognizance. Furthermore, the police investigation linked the accused to some previous criminal activity; a weapons offence. The fact the accused disembarked from the bus was also corroborative.

Even if the police could not arrest the accused for the drugs and gun, they could have arrested him for breach of the recognizance. Plus, a detention was entirely justified in the circumstances and a pat-down search was authorized for officer safety reasons. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

REASONABLE GROUNDS MORE THAN MERE SUSPICION, BUT LESS THAN BALANCE OF PROBABILITIES

R. v. Nguyen, 2010 ABCA 146

The accused became the subject of an investigation after police received a confidential tip that two individuals were trafficking drugs. The informant linked these individuals to a particular address. They did not live there but it was believed that illicit drug activity was taking place. Surveillance of the address revealed the presence of a red Corvette, linked to the accused. He had also been seen at the address. A police informant subsequently provided information that the accused was the head of a criminal network supplying cocaine; he would bring drugs from Vancouver, drove a red Corvette, lived near a Blockbuster video store, and operated out of JOX Sports Bar. Police reports on the accused included information that he had previously provided six ounces of cocaine to an undercover officer and had been charged with selling 58 pounds of marijuana. However, no convictions resulted from either incident. An intelligence log also revealed that someone had appeared at a police station stating that he was scared that his brother, a high-level drug trafficker having the same name as the accused, would harm him. But no action was taken on this file. Furthermore, additional information was received by the drug unit from an unknown source that a red Corvette had been seen at a known drug location and that someone with the accused's first name was selling high amounts of cocaine in downtown Edmonton.

Following a motor vehicle search confirming that the red Corvette was registered to the accused, surveillance was set up. Police saw the accused drive to a mall, circle the lot, and then stop beside another vehicle and have a discussion with two women. Two of the people were using cell phones. One of the women was known to be involved in mid-level drug trafficking. It was believed this was a negotiation between dealers. The accused then went into a condominium complex carrying a black portfolio. Four days later he was seen driving to the JOX Sports Bar where a male entered his vehicle and then left about a minute later. The accused went back to the condominium complex. An hour and a half later he left that location with a black bag.

The next day the accused's vehicle was seen parked at the condominium complex. He left one of the units with an orange and white cell phone box, drove to JOX Sports Bar, remained in his vehicle for about 20 minutes and then drove away. It was believed he used his cell phone. The investigator directed a marked police vehicle to conduct a "traffic stop," which was done in the accused's driveway. The investigator then approached the accused, identified himself, and commented about suspicious activity he had observed at the JOX Sports Bar. When asked if there was any contraband, weapons, or alcohol in the vehicle, the accused said no. The officer opened the orange and white cell phone box in the car, found cocaine and arrested the accused. A search of the car was done and more cocaine, as well as money,

> "The legal threshold to establish reasonable grounds to arrest does not require a prima facie case but rather that the grounds for arrest in all the circumstances are reasonable. The question is whether a reasonable person standing in the position of the officer could conclude that based on all the factors known or observed there were reasonable grounds to arrest. This means something more than mere suspicion, but less than proof on the balance of probabilities."

three cell phones, and a key to a condominium complex, was found.

At trial in the Alberta Court of Queen's Bench the accused alleged his rights under ss.8 and 9 of the *Charter*, among others, had been breached. Following a voir dire the trial judge concluded the police did not breach these rights. He found that when the arresting officer ordered the vehicle stop he had reasonable grounds to arrest the accused for possession of illegal drugs. The accused was convicted on several counts of possessing drugs for the purpose of trafficking, possessing proceeds of crime, and possessing illegal handguns.

The accused then challenged his conviction before the Alberta Court of Appeal, suggesting his arrest was illegal. Although he accepted that the arresting officer subjectively had grounds to arrest for drug possession, he submitted that the trial judge erred in the objective assessment of these grounds. The Court of Appeal disagreed.

Under s.495(1) of the *Criminal Code*, a peace officer has the power to arrest without a warrant. This requires "that an arresting officer subjectively have grounds on which to base the arrest, which must be justifiable from an objective point of view," said the Court. "In other words, the court is required to evaluate, in addition to the officer's own belief, whether such a belief was objectively reasonable. The court must determine whether in all the circumstances at the time of the arrest, viewed objectively, did reasonable grounds exist." The Court continued:

> The legal threshold to establish reasonable grounds to arrest does not require a prima facie case but rather that the grounds for arrest in all the circumstances are reasonable. The question is whether a reasonable person standing in the position of the officer could conclude that based on all the factors known or observed there were reasonable grounds to arrest. This means something more than mere suspicion, but less than proof on the balance of probabilities. Moreover, the standard must be interpreted contextually, having regard to the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest. In evaluating whether objectively reasonable grounds exist, the evidence must be viewed cumulatively. [references omitted, para. 18]

Here, the trial judge considered the facts, the information gleaned from police records, informants, and surveillance in concluding the officer had reasonable grounds to arrest. The subjective test was satisfied and, as for the objective portion of the test, the trial judge found that a reasonable person standing in the shoes of the arresting officer would have reasonably believed that the accused was probably in possession of drugs, taking into account the constellation of facts and information known to him, his own observations, and his extensive experience as an officer investigating the drug trade. Even though another judge may have reached a different conclusion, the trial judge's decision was supported by the evidence:

> Given the confidential source information that [the accused] was involved at a high level in the drug trade, where and how he conducted his business, police intelligence on [the accused] that he had been found in possession of drugs on more than one occasion, although not convicted, his involvement with other alleged associates and their connection to drug trafficking, and the surveillance conducted by police generally and [the arresting officer] specifically which confirmed some of the information, for example,a place and pattern of operating, we cannot say that the conclusion of the trial judge was unreasonable. [para. 20]

"[Section 495(1) of the Criminal Code] requires that an arresting officer subjectively have grounds on which to base the arrest, which must be justifiable from an objective point of

Therefore, the officer had reasonable grounds to arrest prior to the search of the cell phone box. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

RETROSPECTIVE APPLICATION OF SOIRA DID NOT BREACH s.7 CHARTER

R. v. Warren, 2010 ABCA 133

The accused plead guilty to four counts of sexual assault. He was sentenced to a 12 month conditional sentence, placed on probation for two years, and ordered to provide a DNA sample. About 10 months later the *Sex Offender Information Registration Act* (*SOIRA*) was proclaimed and, a couple of years later, the accused was served with a notice to comply with the *Act*. He then applied for a court declaration that the retrospective application of ss.490.019 and 490.02(1) of the *Criminal Code*, relating to his obligation to comply with *SOIRA* breached s.7 of the *Charter*. An Alberta provincial Court judge concluded that a *SOIRA* order was not punishment. It therefore involved only a minimal interference with an offender's liberty and did not violate s.7. An appeal to the Alberta Court of Queen's Bench was dismissed. The accused then appealed to the Alberta Court of Appeal.

A majority of the Court of Appeal found that the established principle of criminal law that there can be no crime or punishment unless it is in accordance with a law that is certain, unambiguous, and not retroactive was not offended. The registration of an offender under *SOIRA* does not constitute punishment and therefore the retrospective application of *SOIRA* did not impose a sanction that offended the principle against the retroactive application of the criminal law. Nor did it impose a process after an offender had been sentenced which offended the principles of natural justice. "There is no principle of fundamental justice to the effect that a statute cannot apply retroactively or retrospectively where the law does not constitute a punishment," said the majority. "While registration in accordance with the SOIRA may infringe an offender's liberty interest, the offender is not deprived of that liberty interest in a manner that contravenes the principles of fundamental justice." Thus, ss.490.019 and 490.02(1) did not breach s.7 despite their retrospective application.

Complete case available at www.albertacourts.ab.ca

BY THE BOOK:

Sex Offender Information Registration Act

The Sex Offender Information Registration Act (SOIRA) came into force in 2004, amending the Criminal Code. Sections 490.011 through 490.032 of the Criminal Code empower a court, on application by a prosecutor, to order those persons convicted of "designated offences" to provide information to the Sexual Offences Registry. The purpose of the SOIRA is "to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders".

Section 490.012(4) requires the court to balance the intended purpose of the Registry with the offender's privacy and liberty interests. A SOIRA order can be denied if a court "is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the Sexual Offender Information Registration Act."

The reporting obligations under SOIRA require both initial and annual reporting to a registration centre. In addition, an offender must, within 15 days, report any change of address, change of name or absence from his primary or secondary residence.

Persons collecting SOIRA information also have responsibilities. The person must ensure that the sex offender's privacy is respected in "a manner that is reasonable in the circumstances" and that the information is provided and collected in a way that protects its confidentiality. The information must be registered in the database in a way that protects its confidentiality. There are strict prohibitions on data usage set and, essentially, the information is available only to police to investigate sexual offences. Public dissemination is not permitted.Depending on the nature of the index offence, the order ends 10 or 20 years after it was made, or applies for life. If the offence is a summary conviction offence or was punishable by two to five years' imprisonment, the order will expire after 10 years. For an offence with a maximum term of 10 or 14 years' imprisonment, the order ends after 20 years. A lifetime order is made if the maximum penalty is a life sentence.

An offender who fails to comply with a SOIRA order, without a reasonable excuse, is guilty of a criminal offence and is liable to a fine of $10,000 or six months' imprisonment, or both, in the case of a first offence. For subsequent offences, the fine is the same, but the maximum term of imprisonment is two years. - Source **R. v. Warren, 2010 ABCA 133**

SOIRA ORDER IS NOT PUNISHMENT

R. v. C.L.B., 2010 ABCA 134

The accused was convicted of touching for a sexual purpose. More than two years later *SOIRA* was proclaimed into law and then 10 months later the accused was served with a notice to comply with the legislation. He then applied for a declaration regarding the constitutionality of the *SOIRA* provisions. He argued that s.490.019 of the *Criminal Code* violated ss.11(h) and (i) of the *Charter*. The Alberta Court of Queen's Bench judge ruled that *SOIRA* and related *Criminal Code* provisions do not impose a punishment, and therefore do not infringe ss.11(h) or (i).

Section 11(h) of the *Charter*

> Any person charged with an offence has the right ... (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

Section 11(i) of the *Charter*

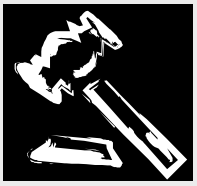
> Any person charged with an offence has the right ... (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

A majority of the Court of Appeal noted that ss.11(h) and (i) "apply only where the real object of the legislation is to punish or where legislation imposes a true penal consequence." However, the registration of an offender under the *SOIRA* does not constitute punishment. Thus, ss.490.19 and 490.02(1) of the *Criminal Code* do not violate either subsections 11(h) or 11(i) of the *Charter*. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

LEGALLY SPEAKING:

Retroactive v. Retrospective



Retroactive - when new legislation addresses and modifies the legal consequences of facts which occurred prior to the commencement of the legislation.

Retrospective - when new legislation modifies only the future effects of past facts, while leaving unchanged the consequences of the facts which occurred prior to commencement of the legislation.

Source: R. v. Warren, 2010 ABCA 133 at footnote 1.

REASONABLE SUSPICION FOR DETENTION & DOG SNIFF ANALYTICALLY DISTINCT

R. v. Schrenk, 2010 MBCA 38

Two police officers were on general patrol in a marked police vehicle. They had a dog specially trained to to detect drugs in the back of the vehicle. After observing a car with Alberta rental plates, they decided to stop it to determine whether the driver had a valid licence, the vehicle was properly registered, and the rental documents were in order. An officer approached the passenger side of the vehicle and asked the accused for his driver's licence and insurance for the vehicle. During this three to four minute interaction the officer made a number of observations which caused him some concern:

- the accused had a British Columbia driver's licence;
- the contract for the car revealed that it had been rented approximately 24 hours earlier in Calgary and was required to be delivered to the Montreal airport less than 24 hours later;

- the accused said he was still living in British Columbia, but explained that he had flown to Calgary from Vancouver and rented the car to drive to Toronto for a little holiday to visit relatives;
- when asked why he would fly from Vancouver to Calgary, but then drive to Toronto, the accused explained he could not afford the flight from Vancouver to Toronto and his family was going to pay for him to get back to Vancouver. The rental agreement set out the total cost of the one-way car rental to be $235.90 per day or $1,140 per week before taxes, which was considerably more than a one-way flight from Vancouver to Toronto.

> "Eighteen minutes of interaction between police and a motorist on a cold winter's day has kept the hearth of the justice system burning for over five years. This appeal is another case about finding the balance between individual liberty and society's interest in the effective investigation of crime."

Inside the car the officer noticed various food wrappers, an open box of bottled water, some other drinks, two cell phones on the console and a large suitcase in the back seat. The officer became suspicious that the accused was lying to him; his trip was nonsensical. The cost of renting the car was much higher than the cost of airfare. He also wondered why a suitcase would be in the back seat of a vehicle with a large trunk. The timing of the trip suggested that the accused was travelling very quickly and could not have stopped, except very briefly. The officer knew from his training and experience that this was a practice used by persons transporting contraband. But a computer check revealed nothing. The officer discussed the situation and his observations with his partner, who then attended to the passenger's side of the car, observed the items inside, and spoke to the accused. He confirmed the accused's travel plans and then returned the driver's licence and rental agreement to the accused. The officer noticed that the accused's hands were shaking violently when he handed the papers back to him to such an extent that he was unable to put his driver's licence back in his wallet. At that point, eight minutes had passed from the time the accused was first stopped.

The officer told the accused, "You're free to leave, Mr. Schrenk, have a safe trip." The accused replied, "Thanks," as he was trying to get his driver's licence back in his wallet. When he could not do so, he put the licence on the console. The officer then waited eight to ten seconds and asked the accused, "Mr. Schrenk, could I ask you a couple of questions? You don't have to answer if you don't want to." The accused replied, "Yeah, sure," but did not make eye contact. The accused was asked whether there was a big drug problem in British Columbia, and he answered, "I wouldn't know anything about that." He looked away and sat on his hands while answering the question.

The officer then believed that he had reasonable grounds to detain the accused for a drug investigation based on the totality of the circumstances. His answers and mannerisms reinforced the officer's suspicions that the accused was involved in illegal activity and that based upon the totality of the indicators he believed that he was not being truthful and was involved in transporting drugs. The accused was asked to leave the car and was detained for a drug investigation. He was explained his right to contact a lawyer, to which he answered, "No, I don't think so." He was then advised of his right to silence. The accused did not consent to a search. He was placed in a police car, without handcuffs, and the sniffer dog was deployed around the car. The dog was trained to recognize the smell of several different illegal drugs, including marihuana. When the dog came to the area near the trunk, she sat down, a signal that drugs were detected. The accused was arrested, advised of his right to counsel and read the standard police caution. A search of the inside of the trunk revealed three bags, each containing marihuana in vacuum-sealed packages weighing about 81.6 pounds and valued between $89,100 and $121,500. The elapsed

time from the stop until the arrest was about 18 minutes.

At trial in Manitoba Provincial Court the accused was convicted of possessing marihuana for the purpose of trafficking. The trial judge found that the accused had not been arbitrarily detained when he was stopped pursuant to the provisions of Manitoba's *Highway Traffic Act* (*HTA*). The officers' questions were objectively linked to issues relevant to *HTA* concerns. Neither his s.10(b) *Charter* rights nor his right to silence under s.7 were violated during this time. And when the officer asked him a question after he was told that he was free to go he was not psychologically detained. The trial judge also ruled that the officer had reasonable grounds to detain the accused for investigative purposes. Finally, in the totality of the circumstances, the dog sniff was not a *Charter* breach because it was not a search within the meaning of s.8, nor was there anything inherently unreasonable in the police action. The accused was given a conditional sentence of two years less one day and fined $10,000.

The accused appealed to the Manitoba Court of Appeal. He submitted that although the initial stop may have been lawful, the officers' questions went beyond legitimate highway safety concerns and turned into a drug investigation. At that point, he submitted that he was unlawfully detained and was not given his right to counsel. Despite being told he was free to go and did not have to answer any questions, the accused felt that he had no choice and was therefore psychologically detained at that point as well. The accused's answer to the question about a drug problem in British Columbia did not give rise to reasonable grounds to detain. While the officer may have had a subjective belief that he had a reasonable suspicion, the reasonable grounds must be both subjectively and objectively reasonable. Lastly, the accused contended that the dog sniff was a breach of his right to be free from unreasonable search contrary to s. 8 of the *Charter*.

The Crown, on the other hand, suggested the accused's initial detention for the traffic stop was lawful, and the routine roadside questioning did not trigger the right to counsel or the right to silence. The routine traffic stop then ended and police pursued their suspicions of crime. Because the accused was not detained, any discussion with police did not trigger the right to counsel or the right to silence. Once the police decided that they had a reasonable suspicion, they lawfully detained the accused for a drug investigation which also authorized the use of the sniffer dog to sniff the outside of the accused's car without becoming an unreasonable search. The totality of circumstances, including the drug dog indication, provided reasonable grounds to arrest the accused and lawful authority to search his car for evidence incidental to the arrest.

PHASE 1: Routine Stop

Section 76.1 of the *HTA* allowed a peace officer, in the lawful execution of his or her duties and responsibilities, to require the driver of a motor vehicle to stop. The driver of the motor vehicle, when signalled or requested to stop by a peace officer who was readily identifiable as such, was then required to immediately come to a safe stop and remain stopped until permitted by the peace officer to depart. Justice Steel, authoring the unanimous Court of Appeal judgment, had this to say:

> It is well accepted that random traffic stops pursuant to highway traffic legislation are a violation of s. 9 of the Charter, but ultimately reasonably and demonstrably justified under s. 1 so long as they are limited in time and scope to the purpose for which they are permitted.
>
> So, the questions that may justifiably be asked on such a traffic stop are those related to driving and highway safety. Any further, more intrusive procedures can only be undertaken upon reasonable suspicion of criminal activity. The court must be alert to the danger of allowing these traffic stops to be turned into a means of conducting either an unfounded general inquisition or an unreasonable search. [paras. 34-35]

Appropriate routine police interaction with a motorist during traffic stops will typically be short in duration, require the production of only a few documents, and will be of minimal inconvenience

to the motorist. They will not constitute a danger to the safety of the motorist, seldom be reason to leave the roadside and attend to a police station, and usually there will be no need to intrusively search the driver or the vehicle.

Here, the traffic stop was in a public place in the middle of the day, with no coercive measures taken by the police. The three to four minutes of polite questioning was about the vehicle and the accused's operation of it. The police questions related to driver licencing, vehicle registration, and permission to have care and control of the vehicle were lawful since they related to the purpose of the stop. The questions regarding the nature of the accused's journey did not exceed the permissible parameters of traffic stop questioning. "It is reasonable for such questioning to include particulars of a trip, such as destination, route and purpose," said Justice Steel. "Given that the rental car was from Alberta and the accused indicated his residency was in British Columbia, it was reasonable for the officer to establish the residency of the driver to ensure proper licencing, an area rationally connected to road safety. The answers he received legitimately raised his suspicions, leading to other questions. ... [The officer] was entitled to reasonably ascertain what he was dealing with given the accused's strange answers and the discrepancy between his driver's licence and the rental agreement." Justice Steel continued:

> In addition, I do not see any concerns raised by the visual observations made by the officers during the traffic stop of items which were in plain view, such as the large suitcase and the lived-in appearance of the vehicle. No Charter concern arises merely from police investigating criminal activity revealed by the traffic stop so long as the limits of police powers for road-safety purposes are respected.
>
> Information gained by police from such roadside questioning can be used as an investigative tool by police to confirm or reject an officer's suspicions so long as the questioning itself related to the vehicle or its operation and was not a general inquisition asking questions such as whether, for example, the accused took drugs or had any criminal convictions.
>
> There is no sound reason for invalidating an otherwise proper stop because the police used the opportunity afforded by that stop to further some other legitimate interest. The police can use a legitimate traffic stop to avail themselves of the opportunity to further some other legitimate police interest, and the gathering of police intelligence is well within the ongoing police duty to investigate criminal activity. [reference omitted, paras. 42-44]

Because the police may be also investigating a possible crime does not takes the officers' actions outside the ambit of a routine stop. "The fact that the questioning may have a secondary purpose does not make the highway stop unlawful so long as the questioning is restricted appropriately," said Justice Steel. "A stop to check a driver's licence is lawful even if there was a secondary purpose of drug investigation." As for s.10(b), "police are not required to give s.10(b) Charter warnings during a brief roadside stop made for road-safety purposes, again so long as the questioning is related to the vehicle or its operation. The exercise of the rights guaranteed by s.10(b) is incompatible with the brief roadside detention contemplated by such a stop." The Court of Appeal found that from the time the accused was pulled over until the time his documents were returned to him and he was told he was free to go, he was detained under the *HTA* but any breach of s.9 was saved by s.1.

PHASE 2: Further Questioning

After telling the accused that he was free to go, the officer waited eight to 10 seconds and then asked the accused if he could ask a few questions. The Court of Appeal found this was simple questioning between the police and a citizen and that the accused was not being psychologically detained in breach of s.9:

> Detention under s. 9 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. A detention must exist before the right to counsel or the right to silence is triggered. While it is usually clear whether someone is being physically restrained, the same cannot always be said about psychological detention.

> When considering interactions between police and citizens, it is important to differentiate between questioning and detention. Not all communications between police and citizens will reach the threshold of psychological detention, even when a person is under investigation for criminal activity, is asked questions or is physically delayed by contact with the police. There is no presumption of detention based merely on questioning occurring between police and a citizen. [paras. 51-52]

Psychological detention occurs "either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply":

> This definition of psychological detention gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their Charter rights relating to detention. It does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Rather, whether a reasonable person concluded that they no longer had the freedom to choose whether or not to cooperate with the police becomes an objective determination, made in light of the circumstances of an encounter as a whole. In cases such as the one at bar, where there is no physical restraint or legal obligation, a detainee-centred, objective inquiry must be undertaken as to whether there was psychological detention.

Here, while the accused was being singled out because he had been stopped, there were no demands or directions made. The officer asked permission of the accused before asking him a question. The officer's tone and voice were non-threatening and the accused would have been released if he did not cooperate. As well, the interaction was brief and minimally intrusive; the accused was mature and sophisticated (he was employed by the Government of British Columbia); and he knew he could say no to the police, since he later refused to consent to a search of his vehicle. As well, all of the accused's documents had been returned to him by the police officer.

PHASE 3: Investigative Detention

The test for investigative detention requires a minimum threshold of reasonable grounds to suspect an individual is involved in recent or ongoing criminal activity. These detentions typically arise from the dynamics of unpredictable street encounters that escalate, and not from mature investigations. A reasonable suspicion imports both an objective and subjective component. "The totality of the circumstances existing at the time the detention commenced is to be considered as to whether the suspicion was reasonable," said Justice Steel. "Although each factor giving rise to reasonable suspicion may appear innocent when viewed by itself, a combination of factors viewed together may warrant further investigation. Each fact or indicator ought not to be separated out for isolated assessment where the police are involved in fluid and fast-paced law enforcement, making quick decisions on limited information." And a judge is entitled to consider a police officer's training and experience in determining objective reasonableness. What may appear to be innocent to the general public may have a very different meaning to an officer experienced in drug operations. For example, many indicators of potential drug couriering are innocent standing alone.

Although the answer to the officer's question ("Is there a big drug problem in B.C.?") by itself would not be sufficient to raise a reasonable suspicion triggering the accused's detention after he was told he was free to leave, there was much more. The question and answer was layered upon everything that preceded it. The officer observed the body language that accompanied it, which included lack of eye contact and hands shaking violently. Plus he had "the nonsensical explanation provided by the accused for his unusual travel plans; the police officer's knowledge that drug transporters try to avoid any demonstrated connection to known source provinces like British Columbia and that rental cars are often used to transport illegal drugs; the fact that the vehicle appeared lived-in; the

accused's physical demeanour – lack of eye contact, nervousness; and the officer's past experience and training." There were reasonable grounds to suspect that the accused was involved in transporting drugs and his detention for investigative purposes was warranted. Even though no crime had been reported, the police can detain to undertake an investigation in circumstances where the police reasonably suspect, but do not know that criminal activity has taken place or is taking place. There is no need to have an actual known crime under investigation. But the reasonable suspicion cannot just be of any bad behaviour. There must be a reasonable suspicion of specific criminal activity which gives rise to the grounds to detain.

The Search

A search incidental to an investigatory detention has been limited to safety-related concerns. The search power does not extend beyond safety concerns to search for evidence or contraband. This restricted search authority is based on a presumption that there will be a physical search of a person, vehicle, or bag. However, the police also possess a common law power to search using drug sniffer dogs on the basis of a reasonable suspicion. Reasonable suspicion has the same meaning for the purposes of ss.8 and 9 of the *Charter*. And the Court of Appeal noted the following concerning reasonable suspicion:

- a reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds;
- a hunch based on intuition gained by experience does not by itself constitute a reasonable suspicion;
- there must be objective grounds which support the opinion of the police officer. These objective grounds must be factual elements beyond subjective belief which can be adduced into evidence and permit an independent judicial assessment;
- to determine whether the reasonable suspicion standard is met in a given case, the totality of the circumstances must be considered;
- there is no fixed checklist of factors which serve as prerequisites for a reasonable suspicion;
- the reasonableness of a police officer's suspicions should be assessed through the lens of common sense and practical experience rather than by resort to pre-ordained lists of indicators deemed adequate to justify a search. The potential meaning of the factors relied on as the basis for a reasonable suspicion must be assessed for their collective, as opposed to individual, significance.

The investigative power to detain on a reasonable suspicion and the investigative power to deploy a sniffer dog to search for drugs on a reasonable suspicion are analytically distinct. Because the police have no right to conduct a sniff search as an incident of an investigative detention, any such sniff search must be independently justifiable. Before a sniff search is undertaken the police must have a reasonable suspicion that the person who is the target of the search is illegally in possession of drugs. Since a reasonable suspicion can trigger both an investigative detention and a sniff search, sometimes there will be an overlap between detention and search. Sometimes the same facts which justify an investigative detention will also justify a sniff search. On the other hand, circumstances warranting a detention will not always or necessarily empower the police to conduct a dog search. Justice Steel stated:

> There must be an independent, lawful basis for a search if it is to be Charter compliant. In this case, the sniff search must be independently justifiable in the sense that there is a reasonable suspicion that the accused was illegally in possession of drugs. In other cases, that lawful basis might be, for example, a warrant, a search incident to arrest, a search incident to detention or a search by consent. In each case, the search power is not unlimited. There must be a nexus between a particular individual and the crime under investigation so there cannot be a generalized search. For example, an arrest for shoplifting would justify a search of the offender's backpack, but not a rectal search. Similarly, a search incident to detention is not unlimited. If detention is the legal basis for the

search, then the police can only search for officer safety.

What the Supreme Court of Canada has done in Kang-Brown is carve out another basis for a search based on reasonable suspicion which applies to cases where the police are using investigative tools such as sniffer dogs. It is a legal basis for a search that is independent of the detention. There may be two bases for conducting a search, a search incidental to detention and a search based on reasonable suspicion alone, which allow the use of an investigative tool.

It is important to remember that even if there was a reasonable suspicion to ground both the investigative detention and the search, they must both have been carried out in a reasonable manner. Where, as in this case, an investigative detention exists concurrent with the reasonable suspicion to justify the use of the sniffer dog, that sniff search may impact on the validity of the detention. Consequently, the length of the investigative detention must be relatively brief and minimally intrusive. So, even if there is a reasonable suspicion so as to allow the dog sniff, if the detention is prolonged unreasonably in order to accommodate the dog sniff, the investigative detention may become unreasonable. [paras. 105-108]

Here, the accused's detention was not unduly prolonged for the purpose of carrying out the search. There were no untoward delays; the dog sniff was conducted quickly and unobtrusively. There was no issue made of the dog's reliability or accuracy. Although the trial judge erred in concluding the dog sniff was not a search, she was satisfied that the police had reasonable grounds to suspect the accused was couriering drugs before they commenced the search. Thus, the warrantless search of the vehicle by the sniffer dog did not breach s.8 of the *Charter* because the police officer had an objectively verifiable, reasonable suspicion that the accused was involved with drug trafficking and the dog sniff was carried out in a reasonable manner.

The accused's detention was not arbitrary, the search was not unreasonable, and the accused's appeal was dismissed.

Complete case available at www.canlii.org

RELEASE OF SIN INFO TO POLICE AGENCIES

Service Canada has signed a Memorandum of Understanding (MOU) with the RCMP, and other police forces have signed a MOU through the RCMP. The MOU allows police to obtain information from the SIR under s.139 (5) of the *EI* Act in order to accurately identify someone, to return lost or stolen property, or to notify next of kin that the holder is deceased.

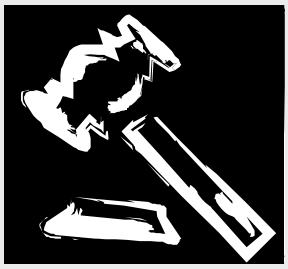
Police agencies (local, provincial, RCMP) may request SIN information, or have SIN confirmation from the RCMP in Ottawa. RCMP will only accept requests from Police Departments for SIN enquiries through CCBSIN@rcmp-grc.gc.ca. Police officers mut provide the following information:

1. Their name, Police agency, address and phone number;
2. Indicate the reason for their request
3. Indicate if the information is needed for court purposes (affidavit required).

The purpose must be to accurately identify individuals, locate next-of-kin, or to locate the rightful owner for found assets.

LEGALLY SPEAKING:

Defence Tactics Challenging a Warrant



"Once again, we see how these ITOs are meat to be devoured by defence counsel. Every word is parsed, every possible inference dismissed, credulity is suspended. These warrants are often obtained in a compressed time frame. ... Counsel, at its leisure, can parse them to death." - British Columbia Provincial Court Judge Doherty in *R. v. Byron*, 2009 BCPC 146, at para. 6.

'GROUNDLESS' ARREST UNLAWFUL: EVIDENCE EXCLUDED

R. v. Noel, 2010 NBCA 28

A police officer, accompanied by a specially trained drug-sniffing dog, observed a vehicle traveling at a speed slightly in excess of the posted limit. He decided to stop the vehicle and warn its driver. A license plate query indicated "no record found", and the accused was pulled over. The officer told the accused, and sole occupant, that he had been stopped for the purpose of checking his vehicle's registration certificate, there being no record for its license plate. The accused explained that the vehicle was a rental and handed over the rental agreement. He also produced his driver's license when asked. The officer saw two cell phones and some food wrappers in the vehicle, but no luggage. The officer returned to his patrol vehicle and realized that the vehicle's return date was nine days overdue. Efforts were made to call the rental company, but they were unsuccessful. The officer then walked back to the accused's vehicle to advise him that efforts were ongoing to contact the rental company and that the investigative process would take a little longer. Once at the window the officer said he was "hit" by an odour of raw marihuana. But he did not confront the accused about the odour. Instead, he obtained a phone number from the accused to call for rental details. A second officer, arriving to assist, contacted the rental company identified in the rental agreement and was advised that the accused remained authorized to operate the vehicle.

The accused was arrested for "possession of marihuana" and removed from the rental vehicle. A search of the passenger compartment was negative. However, the smell of raw marihuana was getting stronger during the search of the back seat area. The trunk was opened and a closed duffel bag containing numerous vacuum-sealed plastic bags of marihuana was located. It was later determined that there were 56 bags, each weighing slightly more than half a pound, for a total of 30.8 pounds (14 kilograms) of marihuana. After the marihuana was discovered, the officer put his dog through a drug sniffing exercise for training purposes. The dog pointed to the presence of drugs in the trunk. The accused was then released from custody at the roadside after promising to appear in court. He was charged with possession of marihuana for the purpose of trafficking.

At trial in New Brunswick Provincial Court the officer said that when he first approached the vehicle from the passenger side he did not smell marihuana. But on his second approach in the same place just a few minutes later "he was hit with a smell of raw marihuana," the sole basis for the accused's arrest. He also did not ask the second officer, who arrived on scene, to corroborate the odour. Nor did he deploy his drug sniffing dog prior to the arrest and search. The trial judge refused to accept the officer's evidence that he detected an odour of raw marihuana from the vehicle. The officer noted no suspicious odour during the initial contact, yet on the second visit to the vehicle, in exactly the same conditions as the first encounter, he noticed an odour of raw marijuana. There was nothing to explain this. Furthermore, the trial judge reviewed some of the officer's other court cases where his sense of smell failed him - drugs were found in vehicles but no odour was noted. The judge rejected the officer's key testimony that he smelled raw marihuana from the vehicle's interior, concluded the arrest was "groundless", and that the follow-up search had been undertaken on a mere "hunch". Since the arrest was unlawful, the incidental search was also unlawful and unreasonable under s.8 of the *Charter*. The evidence was excluded under s.24(2) and the accused was acquitted.

The Crown then appealed the accused's acquittal to the New Brunswick Court of Appeal. It submitted that the trial judge erred by relying on other cases the officer was involved with, facts which were not part of the evidentiary record. Chief Justice Drapeau agreed that the trial judge did err in using information outside the evidential record. But he also concluded that the judge's rejection of the officer's testimony concerning the smell of marihuana was not tied to this information. Thus, the

accused's acquittal was not a product of this extraneous information.

Chief Justice Drapeau acknowledged that had the trial judge believed the officer when he said he smelled raw marihuana then reasonable grounds would have existed. The Court of Appeal then recognized there were two avenues by which the officer could have searched the trunk; (1) with warrant and (2) without warrant.

Search With Warrant

On this method, Chief Justice Drapeau stated:

> The Criminal Code provides a potential avenue of relief for RCMP highway patrol officers who believe that an indictable offence has been committed and that it would be impracticable to appear personally before a Provincial Court judge to make application pursuant to s. 487 for a warrant to search a vehicle stopped at roadside. Section 487.1 is on point and provides that they may apply for a warrant by telephone or other means of telecommunication. That provision applies to indictable offences under the CDSA by virtue of s. 11(2) of that statute. Nothing in the record suggests that both processes under s. 487 and s. 487.1 were unavailable to [the officer]. Had he obtained a search warrant, whether under s. 487 or s. 487.1 by means of [a] cellular phone, the onus would have been on [the accused] to establish the search of his vehicle was "unreasonable" within the meaning of s. 8 of the Charter. As is well known, meeting that onus is relatively difficult having regard to the deference owed by the reviewing court to the issuing judge's decision. [para. 37]

However, the officer did not pursue a search with warrant.

Search Without Warrant

Since the officer proceeded without a warrant, the onus shifted the burden of establishing the search's reasonableness to the Crown. This could have been established if the Crown could demonstrate that the arrest was authorized under s.495 of the *Criminal Code*:

> Section 495(1) states that a peace officer may arrest without warrant a person who has committed an indictable offence or who, on reasonable grounds, he or she believes has committed or is about to commit an indictable offence. It also authorizes a peace officer to arrest without a warrant a person whom he or she finds committing any criminal offence. ... [para. 39]

Here however, the accused contended, as the trial judge found, that the officer acted without the reasonable grounds required by s.495(1). The Court of Appeal concluded that the Crown failed to show that the judge's error in referencing the extraneous information in her reasons ultimately caused her to reject the officer's evidence that he detected the odour of raw marihuana. Since the trial judge found the arrest groundless, it was unlawful as was the warrantless search, which breached s.8 of the *Charter*. The Crown's appeal to overturn the accused's acquittal was dismissed.

Complete case available at www.canlii.org

LEGAL LESSON LEARNED

Search With Warrant:

When the police search with a warrant the search is presumed valid and the accused has the onus of establishing the search was unreasonable within the meaning of s.8 of the *Charter*. Since a reviewing judge owes deference to the issuing judge's decision, this can be a relatively difficult onus to meet for the accused.

Search Without Warrant:

When the police search without a warrant the search is presumed unreasonable and the Crown has the onus of establishing the search was reasonable within the meaning of s.8 of the *Charter*. In cases of searching as an incident to lawful arrest the Crown will need to demonstrate the arrest was authorized, which will include establishing that the arresting officer had the requisite reasonable grounds.

Source: *R. v. Noel*, 2010 NBCA 28

HATE CRIMES RISE

In June 2010 Statistics Canada released a report entitled "Police-reported hate crime in Canada, 2008". Highlights of the report include:

- There was a 35% increase in hate crimes. In 2008 there were 1,036 crimes motivated by hatred towards a particular group, up from 765 crimes reported in 2007.
- Almost half of all police-reported hate crimes were mischief offences such as graffiti on public property. Three in 10 hate crimes involved violence. Two homicides were reportedly motivated by hate in 2008.
- The most common motivation for hate crime was race or ethnicity (55%), followed by religion (26%) and sexual orientation (16%).
- Among racially-motivated hate crimes, Blacks were the most targeted (37.3%), followed by South Asian (11.7%), East and Southeast Asian (8%), Arab or West Asian (6.7%), Caucasian (4%), and Aboriginal (3.6%).
- Among religious-motivated hate crimes, Jewish was the most targeted (64.2%), followed by Catholic (11.7%) and Muslim/Islam (10.1%).
- Youth or young adults accounted for a disproportionate number of accused persons. In 2008, 59% of persons accused of hate crime were between 12 and 22 years of age. Most were male.

Top 3 Hate Crime Motivations

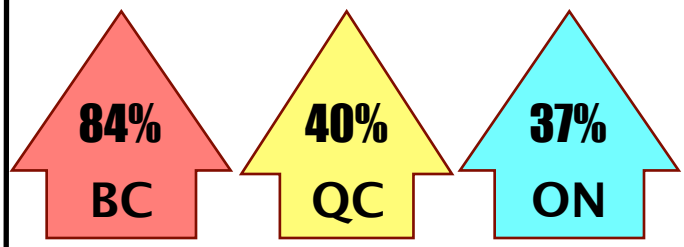
☑ Race or ethnicity	55%
☑ Religion	26%
☑ Sexual orientation	16%

Source: Statistics Canada, 2010, "Police-reported hate crime in Canada, 2008", catalogue no. 85-002-X, Vol. 30, no. 2 at page 15.

What is hate crime?

"There are four Criminal Code offences that are considered to be hate crimes: advocating genocide, public incitement of hatred, wilful promotion of hatred and mischief in relation to religious property. In addition, other offences, such as assaults or threats, may be classified as hate crimes if the incidents are determined to have been motivated by bias based upon race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor."

Source: Statistics Canada, 2010, "Police-reported hate crime in Canada, 2008", catalogue no. 85-002-X, Vol. 30, no. 2 at page 6.



- Between 2007 and 2008, British Columbia, Quebec, and Ontario reported increases, up by 84%, 40%, and 37% respectively.

TOP 10 HATE CRIME RATES CENSUS METROPOLITAN AREAS (CMA)	
CMA	Rate per 100,000
London,ON	8.2
Guelph,ON	8.2
Kingston,ON	7.7
Brantford,ON	6.9
Vancouver,BC	6.3
Hamilton,ON	6.3
Kitchener,ON	6.1
Abbotsford-Mission,BC	5.9
Ottawa,ON	5.6
Vancouver, BC	3.5

Jurisprudence Jolt

IN BRIEF: This section provides a peek of what's happening in appeal courts across the country.

Ontario Court of Appeal

PARTIALLY SEVERING TOE WAS AGGRAVATED ASSAULT

After almost completely cutting off the victim's toe, the accused was convicted in the Ontario Superior Court of Justice by a jury for aggravated assault by maiming. However, he appealed to the Ontario Court of Appeal arguing that he was wrongly convicted of aggravated assault because there was no evidence of maiming. The Court of Appeal disagreed. The victim testified that he was unable to take on his assailant, and although his toe was subsequently reattached, he was left permanently without feeling in it. The accused's conviction and six year sentence less pre-sentence custody was upheld. - **R. v. Stehniy, 2010 ONCA 269**

Ontario Court of Appeal

CROWN FAILED TO PROVE DRUG TRANSACTION ACTUALLY OCCURRED

Following a hand-to-hand transaction with an undercover officer, the accused was arrested within 60 seconds of the take-down signal being given by the officer to the surveillance team. Police searched him but could not find the marked $20 bill the officer used to pay for the crack, nor did he have the baggy with the chunk of crack that the officer said the accused had and from which he had broken off the piece that he sold to the undercover officer. A search of the area for the buy money and the drugs was unsuccessful. And none of the surveillance officers saw the accused discard anything. The accused was known to the officers and recognized by them. The Ontario Superior Court judge considered the missing money and drugs in the baggy, but because the officers knew the accused, she did not find that the missing items raised a reasonable doubt about identity. The accused was convicted of trafficking in crack cocaine.

On appeal to the Ontario Court of Appeal, the accused's conviction was set aside. Although she was satisfied with identity, "the trial judge did not address the question whether it had been proved beyond a reasonable doubt that the transaction actually occurred," said the Court of Appeal. "None of the [surveillance] officers observed the hand-to-hand transaction. ... Most significantly, however, the failure to find the buy money and the drugs on the [accused] or after a search, together with the lack of opportunity for the [accused] to dispose of these items, is unanswered evidence that speaks against the transaction having occurred." An acquittal was entered. - **R. v. Liban, 2010 ONCA 329**

Alberta Court of Appeal

SUBJECTIVE & OBJECTIVE GROUNDS JUSTIFY ARREST

A police officer testified that he saw the accused swallow "spit ball" packages of crack cocaine followed by bottled water. An Alberta Queen's Bench judge found the arresting officer had reasonable and probable grounds to arrest the accused. the officer subjectively believed he had grounds for arrest and, based on his training and his observation of the accused's actions, had objectively reasonable grounds for it. As a result, evidence seized during the search subsequent to arrest was held to be admissible at the trial. This included cocaine residue on a knife and on empty candy containers, bundles of money totalling approximately $2,300, and a cell phone. Callers to the cell phone placed orders using terms synonymous in the drug trade with cocaine. The accused was convicted of several offences including possessing cocaine for the purpose of trafficking and possessing proceeds of crime (cash).

The accused challenged his convictions to the Alberta Court of Appeal, arguing, in part, that the arresting officer's view of the accused was obscured. He said the arresting officer could not have seen the nature of the substance going into his mouth because he put the container "directly to his mouth". But Justice Picard, for

the Court of Appeal, disagreed. The arresting officer said he saw the accused swallow three or four pieces of crack cocaine. And there was no evidence that the accused put the container directly to his mouth in a manner that would totally obscure what he was ingesting. The trial judge used the correct test for warrantless searches. The accused's appeal was dismissed. - **R. v. Tran, 2010 ABCA 119**

Ontario Court of Appeal

STATEMENTS EXCLUDED ON ONE CHARGE BUT ADMITTED ON ANOTHER

The accused was acquitted of producing marihuana and bribery. On the production charge, the trial judge found that the accused's *Charter* rights under ss.9, 10(a) and 10(b) were breached. The accused had language problems and she could not be given her ss.10(a) and (b) rights without the assistance of an interpreter. The accused's statements to police, including what she said during her arrest where she offered money to avoid the arrest, were excluded.

The Crown appealed the acquittals to the Ontario Court of Appeal. The Court ruled that the judge considered the relevant circumstances on the s.9 issue and that there was no basis to interfere with the trial judge's discretion to exclude the statements on the *Charter* breaches as they related to the production of marijuana charge. The the Crown's appeal from that acquittal was dismissed. However, on the bribery charge the accused's statements were admissible as the gravamen of the bribery offence. Despite the *Charter* breaches, the accused was not insulated from liability for her subsequent criminal act. A detained person will still attract criminal responsibility for crimes committed by words e.g. threatening death or offering a bribe even though their *Charter* rights were violated. Citing an earlier case which found that "[s.10(b)] has as its object the provision of counsel to those under investigation for crimes already committed in order that they might be advised with respect to making disclosure, the provision of evidence, etc. regarding of those crimes, [s.] 10(b) cannot possibly relate to crimes yet to come." This rationale applied equally where there was a s.9 breach as well as breaches of s.10 of the *Charter* said the Court. The statements here constituted the *actus reus* of the bribery offence and did not flow causally from the *Charter* breaches. The acquittal on the bribery charge was set aside and a new trial was ordered on that charge alone. - **R. v. Ha, 2010 ONCA 433**

British Columbia Court of Appeal

OFFENDER MUST ESTABLISH FORFEITURE RELIEF

Police executed a search warrant on a two-level home. The upper and lower floors were occupied by the accused, his wife and their four children. In the crawl space police found the accused and his wife attending a 625 plant grow operation. A ventilation system with filters to mask the smell of marihuana was installed and an electrical bypass was found. The potential yearly revenue was estimated at $587,000 to $991,000. The accused and his wife were convicted of producing marihuana, possession for the purpose of trafficking, and electricity theft. They were given 12 month conditional sentences and the accused's interest in the house was forfeited to the Crown.

The accused then appealed the forfeiture order to the British Columbia Court of Appeal. He submitted that the forfeiture of the house would have an adverse impact on his two youngest children and should have been considered by the trial judge under s.19.1(4)(a) of the *Controlled Drugs and Substances Act*. He argued that the word "continues" found in that section did not mean continuous. But Justice Frankel said it did. "[Section 19.1(4)(a)] does require continuous (i.e., uninterrupted) principal residency," he said. But it does not require continuous physical occupancy by an immediate family member throughout the entire relevant period. The offender seeking relief against forfeiture of a dwelling house on the basis that the order would have an adverse impact on a member of his immediate family must persuade a court that such immediate family member existed. This requires evidence and there was no onus on the Crown to establish that s.19.1(4) did not apply. Because the accused lacked the necessary evidence, the Court of Appeal found that s.19.1(4) was not engaged. - **R. v. Bui, 2010 BCCA 279**

Ontario Court of Appeal

NO NEED TO RELY ON PRESUMPTION OF ACCURACY WHEN TECH CALLED

The accused was charged with over 80mg%. At trial, the Crown called the arresting officer and the Intoxilyzer technician who had

made the breath demand and operated the Intoxilyzer. The Certificate of a Qualified Technician was also filed as an exhibit. The accused also testified and called two witnesses, a friend who was drinking with him and a toxicologist. The evidence was that the accused and his friend had been eating dinner at a restaurant together for almost five hours, and the accused had drank six bottles of light beer. Based on calculations, the toxicologist testified that on the basis of the accused's version of events that his BAC would have been between 11mg% and 68.mg% when he was stopped by the police, about one hour after he left the restaurant. The trial judge found the evidence of the accused and his friend to be unreliable as to the amount of alcohol consumed, disbelieved the evidence to the contrary, and convicted the accused. An appeal to the Ontario Superior Court of Justice was dismissed.

A further appeal to the Ontario Court of Appeal was also dismissed. Although the trial judge erred in relying on the circumstances of the breath testing to bolster the reliability of the test results so the presumption of accuracy applied, the Crown not only filed a certificate of analysis but also called viva voce testimony of the Intoxilyzer technician to prove the Intoxilyzer results. Therefore, there was no need to rely on the presumption of accuracy. It was therefore not an error for the breathalyzer results to be taken into consideration when assessing the credibility of thedefence evidence because the presumption of accuracy was not being relied on. - **R. v. Chow, 2010 ONCA 442**

SHINING FLASHLIGHT THROUGH TINTED CANOPY WINDOW NOT A SEARCH

R. v. Grunwald, 2010 BCCA 288

Two police officers set up a motor vehicle check stop to detect possible motor vehicle infractions. The accused, who was driving a Toyota pick-up with a canopy that had tinted windows, was stopped at about 11pm. One officer smelled marihuana while obtaining the accused's driver's licence, but he did not see anything inside the cab of the truck. He conducted a radio check of the driver's licence. A second officer walked around the truck to check the insurance decal on the rear licence plate. He also smelled marihuana and, after confirming that the insurance decal was current, began to investigate the smell. He looked into the bed of the truck with his flashlight and saw garbage bags. One of the bags was open at the top and he could see a Ziploc bag of marihuana inside. He was investigating the smell and was not concerned with officer safety. He then went to the driver's door of the truck and told the accused that he was under arrest for possession of marihuana. The truck took off and the officers were able to stop the accused a short distance away. He was arrested, given his s. 10(b) right to counsel, and the truck was searched. The officers found $400,000 in the cab and 42 lbs of marihuana bud, worth approximately $110,000, in the back of the truck in 80 Ziploc bags contained within the garbage bags. They also found six cell phones, various cell phone cards, calculators, and a notebook containing scoresheets.

At trial in British Columbia Supreme Court the judge found that the accused's s.8 *Charter* right had been breached when the officer shone his powerful flashlight (15,000 candle power) into the truck bed through the tinted windows. The accused's arrest and the search of his vehicle were both unlawful. However, the judge admitted the evidence under s. 24(2). The accused was convicted of possessing marihuana for the purpose of trafficking.

The accused then appealed his conviction to the British Columbia Court of Appeal arguing, among other grounds, that because his rights under the *Charter* were breached the evidence should have been excluded under s.24(2). The Crown, on the other hand, argued there were no breaches.

s.9 - Arbitrary Detention

Although random traffic check stops infringe a person's right to be free from arbitrary detention under s.9, they are justifiable pursuant to s. 1 of the *Charter*. Thus, there was no *Charter* breach as a result of the initial stop of the vehicle. But the accused contended that if a police officer wishes to investigate something unrelated to a motor vehicle infraction, they must have reasonable grounds to embark on such an investigation and, in this case, once the officer started investigating the smell of

marihuana the justification for the initial stop expired. Since a different investigation commenced in the course of the stop, he suggested the detention was no longer justified under s.1.

The Court of Appeal rejected this submission. If a police officer has a lawful and reasonable basis to stop a vehicle, the fact there are other reasons to effect a stop does not necessarily transform the stop into an arbitrary detention. Here, the accused was stopped in a road check and was still being investigated pursuant to that stop when the officer found the marihuana with his flashlight. "There was no shifting of the purpose for detention," said Justice Bennett. "The initial detention was lawful and the fact that one officer pursued a new avenue of investigation while the original investigation was ongoing did not transform the detention into one which is arbitrary."

s.10(b) - Right to Counsel

The accused argued that upon being stopped, the police were required to advise him of his right to counsel pursuant to s.10(b) of the *Charter* and once again when the 'new' investigation into the smell of marihuana began. The Court of Appeal also rejected this submission. Generally, motor vehicle stops do not require police to advise the detainee of their right to counsel before an investigation proceeds. Although s.10(b) is engaged, the police need not advise the detainee of the right to a lawyer because the breach is saved by s.1 of the *Charter* as a justifiable limit prescribed by law:

> Therefore, there was no violation of [the accused's] right to counsel when he was stopped at the road check. I have already agreed with the trial judge that there was never a second detention. Accordingly, there was no requirement for the constable to advise [the accused] of his right to counsel before he looked into the back of the truck. These are fact-specific determinations, and where, as here, the person is properly detained, the fact the officer looked about does not change the nature of the detention. The nature of the detention changed when [the officer] saw the marihuana. [The officers] acted appropriately and in accordance with [the accused's] Charter rights when this occurred. [The officer] saw the marihuana and immediately arrested [the accused]. [Police] advised him of his right to counsel, once his vehicle was stopped. [para. 28]

s.8 - Search and Seizure

The examination of the interior of a vehicle during the course of a traffic stop, using a flashlight, did not constitute an unreasonable search. The police are entitled to use flashlights to carry out their inspection of vehicles and drivers at night, as well as to aid in their safety. But, on the other hand, the police cannot use a random check stop to pursue an "unfounded general inquisition or an unreasonable search".

Here, "the visual inspection in this case was not a necessary incident to the check stop." said Justice Bennett. "At the time that [the officer] shone his flashlight through the back window, he had finished with his business of inspecting the vehicle for Motor Vehicle Act violations." Even so, there was no search. The accused did not have a reasonable expectation of privacy in the items in the back of his truck which were visible through the canopy window. The totality of the circumstances here did not found an objectively reasonable expectation of privacy:

- it is well-established that there is a reduced expectation of privacy in a vehicle;
- driving is a heavily regulated activity, and motorists should and do know that while on the road, they are subject to police traffic stops, traffic cameras, streetlights, and the eyes of other curious drivers;
- the marihuana was in plain sight. The canopy had windows, albeit tinted. However, it was possible to see through the tinting and to view the contents of the truck bed, as the officer did.

The officer's use of the flashlight to see through the tinted canopy window did not render the contents of the truck out of plain sight. Nor did using the flashlight transform the officer's visual inspection into a search:

In my view, common sense tells us that the police, working at night, will have occasion to use flashlights in the ordinary course of their duties. It is not objectively reasonable to expect that they would not. When the police are lawfully where they are permitted to be, the use of artificial illumination should not automatically constitute a search. [para. 39]

"[C]ommon sense tells us that the police, working at night, will have occasion to use flashlights in the ordinary course of their duties. It is not objectively reasonable to expect that they would not. When the police are lawfully where they are permitted to be, the use of artificial illumination should not automatically constitute a search."

And further:

> [P]lain view is not limited to daytime hours. If a flashlight is used to see what would be visible in daylight hours, such as objects in the back of a pickup truck or the interior of a motor vehicle, the item does not cease to be in plain sight when the sun goes down.
>
> If the use of an ordinary flashlight to look through the window of a car does not constitute a search, as I have decided, then I cannot see how the use of a flashlight to look through a tinted window does. It would be absurd to tell police officers that they can use their flashlights to look through clear windows but not tinted windows. If an officer attempts to look through a tinted window with his flashlight and sees nothing, then what is on the other side of the window is not in plain sight. [The accused's] real complaint is that his window tinting was ineffective.
>
> .....
>
> A police officer is not required to avert his eyes when he comes across something suspicious that is unrelated to the investigation he is pursuing. In the circumstances of this case, where [the officer] had lawfully stopped the vehicle, where the smell of marihuana was obvious and the back of the truck was open to public view, [the officer] was entitled to look through the canopy window into the back of the truck.

"A police officer is not required to avert his eyes when he comes across something suspicious that is unrelated to the investigation he is pursuing."

In these circumstances, [the accused] had no reasonable objective expectation of privacy in the back of his truck. It follows that there was no search, and therefore no s. 8 violation. The officer saw the marihuana, which gave him reasonable grounds to believe that [the accused] was committing an offence. He arrested [the accused] and the marihuana was seized incidental to that arrest. [paras. 45-49]

The accused lacked a subjective expectation of privacy as well. Although he had an interest in keeping the contents of his truck bed private - he used a canopy over the bed and tinting on the windows and transported the marihuana at night - he knew that it was possible to see through the windows and that was a risk he took. "A wish for privacy is not the same as an expectation," said Justice Bennett. The accused had no subjective expectation of privacy in the back of his truck.

Since there was no reasonable expectation of privacy, the officer looking into the back of the truck with a flashlight and observing marihuana in plain sight was not a s.8 "search" and therefore there was no *Charter* violation. Thus there was no reason to resort to s.24(2).

Complete case available at www.courts.gov.bc.ca

LEGALLY SPEAKING:

SEARCH ON ARREST

"The existence of reasonable grounds to believe the accused is in possession of weapons, or evidence, is not a pre-requisite to the existence of [the police power to search following arrest] so long as it is exercised for a valid purpose arising from the arrest and directed to the administration of justice." - British Columbia Provincial Court Judge Hicks in *R. v. Nijjar*, 2009 BCPC 192, at para. 17.

TEST FOR REASONABLE GROUNDS NOT OVERLY ONEROUS

R. v. Wang, 2010 ONCA 435

A police officer saw the accused driving in the center lane of a three lane highway. The vehicle swerved within her lane and crossed about six inches over the dotted lines that separated the three lanes of traffic on at least three occasions on each side. As well, the vehicle's speed fluctuated. It slowed to about 60 km/h in a posted 90 km/h zone and then would speed up to about 80 km/h, then back to 60 km/h. The officer activated his emergency equipment and the accused was slow to pullover. An odour of an alcoholic beverage was coming from the vehicle and, when she stepped out of the vehicle at the officer's request, and odour of alcohol was isolated to her breath. Her face was also flushed. In response to questioning, the accused said she had one drink, then said maybe two drinks, that evening. She was arrested for impaired driving, given the breathalyzer demand, and provided samples of breath over the legal limit; 100mg% and 90mg%.

At trial in the Ontario Court of Justice the accused argued that the officer did not have reasonable grounds to make the breath demand and therefore her rights under s.8 of the *Charter* were breached. The trial judge agreed. Although he found the officer had the subjective belief required to make the demand, that belief was not objectively supported by the facts. The judge noted that the accused was not speeding, there was no accident, and no jerky or violent motions. Nor were there any conventional or orthodox signs of impairment. There was no slurred speech and no glazed, glossy, glassy, unfocussed or bloodshot eyes. She was responsive to the officer's questions, polite and cooperative, and the odour of alcohol was noticeable, but not strong. And she had no difficulty with her eye coordination and steadiness. The breathalyzer readings were excluded under s.24(2) and the accused was acquitted of impaired driving and over 80mg%.

> "[W]here a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A prima facie case need not be established."

The Crown's appeal to the Ontario Superior Court of Justice was successful. The appeal judge found the trial judge had mixed up the objective test with the subjective belief of the officer, thus applying the wrong legal standard to the facts in the case. Here, there was no issue that the officer subjectively had the requisite state of mind. What needed to be determined was whether the officer's subjective belief was objectively reasonable. Since the trial judge applied the wrong principles to the objective component of the reasonable grounds test, the accused's acquittal was set aside and a new trial was ordered.

The accused then appealed to the Ontario Court of Appeal arguing that, contrary to the finding of the Ontario Superior Court, the trial judge did not err in his legal analysis of what constituted reasonable and probable grounds to make a breathalyzer demand

Reasonable & Probable Grounds

In deciding whether the trial judge had properly applied the law in assessing whether there was a sufficient objective basis for the officer's subjective belief that he had reasonable and probable grounds to demand breath samples, Justice Rouleau, delivering the unanimous judgment for the Court of Appeal stated:

> The test for deciding whether there are reasonable and probable grounds includes both a subjective and an objective component: (i) the officer must have an honest belief that the suspect committed an offence under s. 253 of the Criminal Code, and (ii) there must be reasonable grounds for this belief. [reference omitted, para. 14]

And further:

In short, ... where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A prima facie case need not be established. Rather, when impaired driving is an issue, what is required is simply that the facts as found by the trial judge be sufficient objectively to support the officer's subjective belief that the motorist was driving while his or her ability to do so was impaired, even to a slight degree, by alcohol.

...

In the instant case, no issue is taken with the fact that the officer had the requisite subjective belief. Moreover, there is no controversy about the facts on which he based his belief. The sole issue is whether his subjective belief was objectively reasonable in the circumstances. ... I am of the view that the trial judge erred in concluding that the officer's subjective belief was not reasonable in the circumstances.

The facts, supporting a finding that the officer's subjective belief was reasonable in the circumstances were as follows:

(1) the [accused] was driving at widely varying speeds below the speed limit as slow as 60 kilometres and as fast as 80 kilometres in a 90 kilometres an hour zone;

(2) the [accused] was driving in the middle lane of the three north bound lanes of the Don Valley Parkway and cars were passing her on both sides;

(3) the [accused] was repeatedly swerving within and between the lanes;

(4) the [accused] continued to drive for a significant distance while being signalled to pull over by police in a marked cruiser, first by flashing lights, then use of an electric air horn, and eventually by use of the car's siren;

(5) when she was eventually stopped, the [accused] stopped in a live lane of traffic rather than on an available, albeit narrow, shoulder;

(6) there was an obvious odour of alcoholic beverage coming from the [accused's] breath;

(7) the [accused's] face was flushed; and

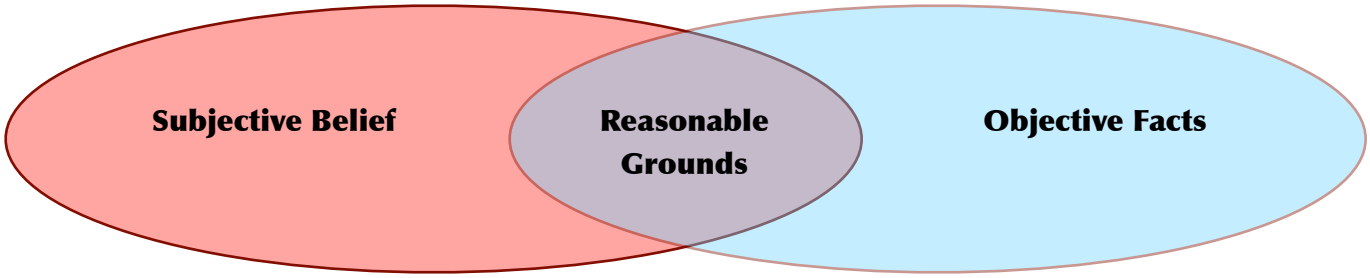
(8) when initially questioned by the officer, the [accused] admitted to having consumed one alcoholic beverage. When the officer expressed disbelief, she changed her answer acknowledging that she may have had two.

In my view, these facts are sufficient, at law, to objectively support the officer's subjective belief that the {accused] was driving while impaired by alcohol. The fact that some of the traditional indicators of impairment, such as slurred speech and bloodshot eyes, were not present does not render the officer's subjective belief, based on the signs he did observe, objectively unreasonable. As a result, I would find that the officer had reasonable and probable grounds to make the arrest and make the breath demand and that the [accused's] Charter claim must therefore fail. [references omitted, paras. 17-21]

Since the breath demand was proper, there was no s. 8 *Charter* breach and therefore no need to address s. 24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

"The test for deciding whether there are reasonable and probable grounds includes both a subjective and an objective component: (i) the officer must have an honest belief that the suspect committed an offence under s. 253 of the Criminal Code, and (ii) there must be reasonable grounds for this belief."



REASONABLE SUSPICION CAN BE COMMUNICATED BY OTHER OFFICER

R. v. Nahorniak, 2010 SKCA 68

A sergeant, engaged in preventative patrols throughout the camping area at a music festival, was involved in stopping individuals and checking vehicles to ensure drinking and driving laws were obeyed. At about 3:20 a.m. he approached a vehicle he saw turn into an alleyway between two tents. He detected an odour of alcohol coming from the vehicle. The accused was in the driver's seat with a bottle of vodka between his legs. The sergeant asked the accused to come to the police vehicle. The accused did not stumble, stagger or slur his speech. He was coherent, polite, and co-operative. The officer could smell alcohol coming from the accused, who said he had last consumed two drinks an hour before. The sergeant felt he had grounds to make an approved screening device (ASD) demand, but did not have one with him nor was he qualified to use it. He radioed for a constable to attend with an ASD, told him what his grounds were, and asked him to administer the test. The constable attended to the accused seated in the back of the police vehicle, smelled alcohol, and gave the ASD demand. A fail reading resulted and the accused was taken to the police detachment where two breath samples of 120mg% and 100mg% were received.

> "[R]easonable suspicion can be achieved either by the officer's personal knowledge and observation or the communicated observations of others or a combination of both."

At trial in Saskatchewan Provincial Court the accused argued that his *Charter* rights had been breached and that the Certificate of Analysis should have been excluded under s.24(2). He argued that neither the sergeant nor the constable possessed the reasonable suspicion needed to make an ASD demand and even if the sergeant did have the suspicion, the constable did not. The trial judge found that the sergeant reasonably suspected the accused had alcohol in his body, but that the constable did not. Neither of them had notes referring to the information that was passed between them, nor did the constable testify that he was told that the accused had the vodka bottle between his legs or that he said he had been drinking alcohol. The constable did not testify that the odour of alcohol was strong or that the odour of alcohol came from the accused's breath. And the constable took no additional steps in his investigation independent of the sergeant prior to making the demand, readying the device for use, or administering the ASD test. Since the constable did not comply with the requirements of s.254(2) of the *Criminal Code* in administering the ASD test, the accused's s.8 *Charter* rights were violated and the Certificate of Analysis of the breath samples was excluded. The accused was acquitted of the impaired driving and over 80mg%.

The Crown appealed to the Saskatchewan Court of Queen's Bench. The appeal judge agreed with the trial judge that there had been a s.8 *Charter* breach because the constable had insufficient grounds to reasonably suspect the accused had alcohol in his body. Although the constable said he relied on the grounds relayed to him by the sergeant and was entitled to do so, he could not articulate them. The constable did not testify that he independently smelled alcohol on the accused's breath nor had he been advised by the sergeant that the sergeant had smelled alcohol on the accused's breath. However, because the appeal judge was not satisfied with the s.24(2) analysis, she set aside the acquittal and remitted the case back to the trial judge to conduct a redetermination of the appropriate remedy under s.24(2).

The Crown appealed to the Saskatchewan Court of Appeal arguing there was no s.8 breach and, even if there was, the evidence of the Certificate of Analysis should not be excluded and a conviction entered. The accused also appealed submitting that the appeal judge's decision remitting the case back for a new s.24(2) analysis should be set aside and the acquittal restored.

Reasonable Suspicion

Here, the Saskatchewan Court of Appeal concluded that the accused's s.8 *Charter* rights had not been breached. The constable was entitled to rely on the sergeant's observations without independent verification:

> [R]easonable suspicion can be achieved either by the officer's personal knowledge and observation or the communicated observations of others or a combination of both. This is so even where the officer making the demand cannot precisely articulate the information conveyed to him but there is nevertheless other testimony or evidence of what was conveyed.
>
> It is not necessary for an officer to independently investigate and verify grounds of reasonable suspicion conveyed to him as long as he subjectively believes them. For [the constable] specifically, it was enough that he knew the grounds and believed them at the time he made the demand and his belief was objectively and subjectively reasonable. In this case, [the constable] testified he relied on [the sergeant's] grounds but also relied on his own observations to form his reasonable suspicion. [The constable] stated three reasons to suspect [the accused] had alcohol in his body. He assumed that [the sergeant] had proper grounds and made the demand because [the sergeant] asked him to. He relied on what [the sergeant] told him. Finally, he independently smelled alcohol coming from [the accused]. Although it would have been preferable for [the constable] to articulate the grounds [the sergeant] told him, his failure to do so was not fatal because [the sergeant] was able to articulate the details of what was conveyed.
>
> In deciding whether an officer had grounds to make the demand and administer the test, a court must consider all the circumstances and evidence with respect thereto known to him when he made the demand. [references omitted, paras. 21-23]

In this case, both lower courts found that the sergeant had a reasonable suspicion. But by considering only the grounds that the constable was able to articulate at trial and his independent investigation, the trial judge failed to consider all the evidence that was before him about the constable's reasonable suspicion. Although the constable failed to testify that he had smelled alcohol on the accused's breath, the sergeant told him that he had smelled it. Therefore, the constable's failure to testify that he also smelled alcohol on the accused's breath and take steps to satisfy himself that the smell was not originating from a source outside the accused's body did not matter. Justice Ottenbreit, delivering the unanimous Court of Appeal judgment, said this:

> Mere failure to smell alcohol on a person's breath is not fatal to forming reasonable suspicion. In this case, [the accused] was in the back seat of a police cruiser. [The constable] was not obliged to sniff various parts of [the accused's] body or the cruiser to eliminate all speculative scenarios such as the smell coming from the cruiser itself or only the clothes of [the accused] before he could have reasonable suspicion. Whether it is necessary to isolate the accused's breath as the source of the alcohol smell will depend on whether the source of the alcohol smell is unclear given the circumstances. In this case it was obvious the smell was emanating from [the accused].
>
> The smelling of alcohol on a person's breath, although cogent evidence of alcohol in the body, is not always the sine qua non of "reasonable suspicion." ... [T]he smell of alcohol on the accused's breath may be a sufficient condition of reasonable suspicion rather than a necessary one. [references omitted, paras. 26-27]

The Court of Appeal concluded that the constable had a reasonable suspicion to make the ASD demand and that there was no s.8 *Charter* breach. The Crown's appeal was allowed, the Certificate of Analysis was admitted, and a conviction was entered. The matter was remitted back to the trial judge for sentencing.

Complete case available at www.canlii.org

www.10-8.ca

RAW MARIHUANA SMELL PERMITTED CONCLUSION DRIVER IN POSSESSION

R. v. Harding, 2010 ABCA 180

An Alberta police officer stopped a Dodge Durango sports utility vehicle with BC licence plates because the licence plate numbers and registration tag were obscured by mud. The officer approached the passenger side of the Durango, saw the accused was the lone occupant, and observed two large hockey bags in the back compartment. At the passenger side window the officer smelled the very strong odour of raw marijuana. The accused was asked for his driver's licence, registration and insurance, and where he was coming from and going to. He handed over the requested documents and said he was from British Columbia and was going to Edmonton. The officer decided to arrest the accused when he smelled the strong odour of raw marijuana, but wanted to first find out as much information about the occupant of the vehicle as he could for officer safety reasons. A computer check revealed the accused had a criminal record and had been a person of interest in a suspected grow operation in British Columbia in 2001. Another officer arrived to offer assistance and the rental status of the vehicle was verified. The accused was told he was going to be arrested. In response, he rolled up his side window, locked the doors, and made a call on his cellular phone. He was asked to exit the vehicle and complied. He was arrested for possession of marijuana. Police entered the vehicle and smelled a strong and overpowering odour of raw marijuana. The two hockey bags contained approximately 56 pounds of raw marijuana. The accused was then read his *Charter* rights.

> "The smell of raw marijuana alone was sufficient to conclude that the [accused] was at that time in possession of marijuana."

At trial in the Alberta Court of Queen's Bench the trial judge ruled that there were reasonable grounds (subjectively and objectively) for the warrantless arrest. The officer had experience in enforcing drug laws, the vehicle had British Columbia plates (a province notorious for drug production), two large bags were seen in the back of the vehicle, a strong odour of raw marijuana was detected, and the vehicle was a rental car (commonly used in the drug trade to avoid identification and detection). Even if there was an unreasonable search, the judge would have admitted the evidence in any event. The officer acted in good faith and any breach would not have been serious. The admission of the evidence would not render the trial unfair and the accused had a reduced privacy interest in the vehicle – he was not the owner. The accused was convicted of possessing marihuana for the purpose of trafficking.

The accused then appealed to the Alberta Court of Appeal contending that the arrest was unlawful, the search of the vehicle and seizure of the marihuana was unreasonable, and that his s.10(b) rights had not been provided in a timely fashion. Thus, in his view, the evidence should have been excluded.

Arrest

Under s.495 of the *Criminal Code* an arrest may be made without a warrant. This requires that an arresting officer must have reasonable grounds on which to base the arrest. "The arresting officer must personally believe that reasonable grounds exist and those grounds must, in addition, be justifiable from an objective point of view, i.e., a reasonable person placed in the position of the officer must be able to conclude that there were reasonable grounds for the arrest," said the Alberta Court of Appeal. "In assessing those grounds, the circumstances leading to the arrest and the arresting officer's training and experience must be considered." Here, the accused conceded that the initial traffic stop was not arbitrary because of the obscured licence plate. And just because the officer was concurrently conducting a traffic inquiry while observing grounds for a drug related offence did not make the detention arbitrary.

The trial judge listed five circumstances which led the officer to arrest the accused for possession of marijuana:

BY THE BOOK:

s. 495(1) *Criminal Code*

Arrest without warrant by peace officer

A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(a) his great deal of experience in enforcing drug laws and his "know how";
(b) his observation of the Durango approaching from the west, traveling east with licence plates from British Columbia, a notorious source of drugs;
(c) seeing the two large bags in the back compartment of the Durango;
(d) the powerful smell of marijuana noted by his well trained nose; and
(e) concurrently with the aroma of marijuana emanating from the Durango, the determination that the vehicle was a rental car, commonly used by persons in the drug trade as part of their efforts to avoid identification and detection.

But the only relevant objective factor in the Court of Appeal's view was the strong odour of raw marijuana emanating from the vehicle. The other factors were mere suspicions. The smell, however, did not permit the officer to ascertain the quantity of marijuana. Possession of more than 30 grams constitutes an indictable offence while 30 grams or less is only a summary conviction offence.

> Without knowing the quantity of marijuana, the officer could not have grounds to support a charge of possession for the purposes of trafficking. The smell of raw marijuana (or harvested marijuana as it is sometimes called) alone could only provide grounds for an arrest for simple possession, a summary conviction offence.
>
> Section 495(1)(a) provides for arrest on reasonable grounds where the officer believes the person "has committed or is about to commit an indictable offence". In this case in order to arrest on a summary conviction offence without warrant, section 495(1)(b) must apply. It provides that an officer may arrest "a person whom he finds committing a criminal offence". [paras. 21-22]

The question here then, was whether it was lawful to arrest a person for simple possession of marijuana under s.495(1)(b) as a person found committing based solely on the smell of marijuana. The Alberta Court of Appeal held that it was.

> [The officer] smelled the very strong odour of raw marijuana, not burnt marijuana. The smell of raw marijuana, given [the officer's] experience with marijuana, constituted the observation that a crime, namely, possession of marijuana, was being committed. No inference was necessary. The possession of marijuana was not a past event and the officer did not need to infer that he could find more marijuana by searching the [accused] or his vehicle. The smell of raw marijuana alone was sufficient to conclude that the [accused] was at that time in possession of marijuana. [paras. 29]

"[The officer] smelled the very strong odour of raw marijuana, not burnt marijuana. The smell of raw marijuana, given [the officer's] experience with marijuana, constituted the observation that a crime, namely, possession of marijuana, was being committed."

Thus, the accused was lawfully arrested under section 495(1)(b).

Search

Since the arrest was lawful, the search and seizure of the marijuana was also lawful and there was no breach of s.8 of the *Charter*. Since there was a lawful arrest, the police were entitled to search the accused incidental to arrest and his vehicle; there was some rational connection between the offence for which the accused was arrested and the areas of the vehicle that the police searched.

Right to Counsel

The accused argued that his rights under s.10(b) of the *Charter* were breached because he was not informed initially of his *Charter* rights immediately upon the officer forming his intent to arrest for possession of marijuana. Although s.10(b) requires a person, on arrest or detention, to be informed of their right to counsel, the words "without delay" (or "immediately") are subject to concerns for officer or public safety.

Here, the officer said he went to conduct a computer search into the accused's background because of a concern for officer safety given his experience of the danger often associated with drug arrests. He also took what he estimated were a few minutes to ensure that the accused was lawfully in possession of the rental vehicle before arresting him. "In these circumstances, the arresting officer had reasonable concerns for his own safety and the delay in informing the [accused] of his rights to counsel did not violate section 10 of the Charter," said the Court of Appeal.

Section 24(2) Analysis

Even if the police delay in informing the accused of his right to counsel was a breach, the evidence should nonetheless be admitted. The time delay was minor and the officer acted in good faith. He honestly believed he had grounds for arrest based on the smell of raw marijuana but did not immediately do so because of officer safety concerns. The impact of any breach was not serious and resulted in no prejudice to the accused. During the delay, no evidence was conscripted nor did the accused provide any inculpatory statements. And the physical evidence was reliable. Its exclusion would tend to undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

CIRCUMSTANCES OF ACCIDENT CAN FORM PART OF OFFICER'S OPINION OF IMPAIRMENT

R. v. Watson, 2010 BCCA 270

Just before 1:00 a.m. two people in a large family group walking to their hotel from a pub were hit by a car driven by the accused. Family members approached the car and told the accused not to leave and he was punched at least once in the face. A police officer arrived on scene and, after checking the injured, spoke with the accused. On request, the accused produced his driver's licence from the dashboard of the vehicle without any difficulty. The officer smelled a moderate odour of alcohol coming from the accused's breath and noted that his eyes were red and watery. He also had a fat lip from where he had been punched earlier. His speech was slurred and his face was red. The accused was then asked to step out of the vehicle. His balance was poor - he was unsteady and swaying on his feet and swaying a little while walking. But his turning was good and he had no difficulty getting into the police vehicle. Based on his observations and the information he had received from the family members, the officer formed the opinion that the accused was impaired. The accused was given the breath demand and subsequently provided samples of his breath over the legal limit. He was charged accordingly.

At trial in British Columbia Provincial Court the judge ruled the breath demand was lawful. In his

view the factors open to the officer to consider in forming his grounds were:

(a) a motor vehicle accident where two pedestrians are hit in circumstances where the officer is told the vehicle never slowed down and never took evasive actions such as braking to avoid the collision;
(b) a moderate smell of alcohol from the accused's breath;
(c) red and watery eyes;
(d) slurred speech;
(e) a flushed face;
(f) swaying a little while walking;
(g) others saying it was their opinion the accused was drunk;
(h) no difficulty producing driver's licence, no difficulty getting into the police vehicle, and the accused being polite and cooperative. and the test results were admissible.

The judge rejected a defence submission that the officer only considered what the family members had told him about the accused's sobriety in reaching his opinion. Rather, the officer had the subjective belief necessary for the demand as well as the objective grounds. The breathalyzer results were admitted and the accused was convicted of over 80mg%, contrary to s.253(b) of the *Criminal Code*. Two counts of impaired driving cause bodily harm were dismissed.

The accused then appealed to the British Columbia Court of Appeal arguing the trial judge erred in finding that there was an objective basis for the officer's opinion that the accused's ability to operate a motor vehicle was impaired by alcohol. Justice Kirkpatrick, delivering the unanimous opinion, disagreed. Here, the trial judge considered not only what the officer was told to him at the scene, but also the officer's own observations:

> [The officer] testified as to the chaotic scene he encountered on arrival at the collision site. He noted that the weather and road conditions were dry. He observed no skid marks on the road in the area of the collision indicative of braking. He saw damage on the right front end and windshield of [the accused's] car. He observed [the accused] in the driver's seat of the car and two cans of beer in the centre console which he initially testified were both open. Under cross-examination, he readily conceded that the can next to the driver was unopened.
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> [The officer] testified that he spoke with the upset family members, examined the accident scene, and spoke with [the accused], at which time he detected the smell of alcohol on his breath, noted his red and watery eyes, slurred speech, and flushed face. It is obvious reading [the accused's] evidence as a whole that it was "as a result of those observations and the information" he received from "the people milling about" that [the officer] formed his opinion that [the accused's] ability to operate a motor vehicle was impaired by alcohol. [paras. 10-12]

Although the officer did not specifically state that the circumstances of the accident formed part of his grounds of belief, he testified as to his observations of the accident. It was the totality of his observations that informed his opinion.

The accused's contention that the objective basis for the grounds had innocent or non-culpable explanations was also rejected. The fact that the scene of the collision was dark and a distance from the nearest intersection, the roadway was paved and there was no suggestion that the car had left the roadway, and no account for why the pedestrians were walking on the wrong side of the roadway did not render the accident irrelevant in the officer's assessment of the grounds to demand a breath sample. This suggestion was unrealistic given that two pedestrians had been struck by the accused's car with no evidence of braking, which was consistent with the family members' account. Nor did innocent explanations offered for red, watery eyes, flushed face, and slurred speech negate the officer's opinion of impairment. If this were the case, the court would be isolating the objective observations of impairment and the circumstances of the accident from consideration. Instead, the British Columbia Court of Appeal concluded there was evidence to support the police officer's opinion of impairment. The accused's appeal was dismissed.

Complete case available at www.courts.gov.bc.ca